(ORDER LIST: 535 U.S.)

MONDAY, APRIL 8, 2002

ORDER IN PENDING CASE

01-9094 (01A702) ABDUR'RAHMAN, ABU-ALI. V. BELL, WARDEN

The application for stay of execution of sentence of death presented to Justice Stevens and by him referred to the Court is granted pending the disposition of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for a writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

CAPITAL CASE - EXECUTION DATE: 4/10/02 1:00 a.m.

No. 01-A702

In The
Supreme Court of the United States

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SUPREME COURT, U.S.

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell,

Respondent.

MOTION FOR A STAY OF EXECUTION

For the reasons set forth in the accompanying Petition for a Writ of Certiorari, Petitioner Abu-Ali Abdur'Rahman respectfully requests that this Court enter an order staying the execution of sentence of death pending the disposition of the Petition and, if the Petition is granted, until the issuance of the mandate of this Court.

Respectfully submitted,

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March 18, 2002

Nos. 01-9094 & 9095

In The
Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell,

Respondent.

In re Abu-Ali Abdur'Rahman,

Petitioner.

RECEIVED
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SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

The undersigned certifies that he has this 18th day of March, 2002, served a copy of the foregoing petition for a writ of certiorari, petition for an original writ of habeas corpus, motions for a stay of execution, and motions for leave to proceed *in forma pauperis* upon the below-named counsel for respondent by facsimile, Federal Express, and first-class mail, postage prepaid, and furthermore certifies that all persons required to be served have been served:

Gordon W. Smith
Associate Solicitor General
425 Fifth Ave., North
Nashville, TN 37243
(615)741-4150

Victor S. Johnson, III
Office of the Dist. Att'y Gen.
20th Judicial District
222 Second Avenue North, Suite 500
Nashville, Tennessee 37201-1649
(615) 862-5507

Thomas C. Goldstein

CAPITAL CASE – EXECUTION DATE: 4/10/02 1:00 a.m.

Nos. 01-___ & ___

In The
Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell,

Respondent.

In re Abu-Ali Abdur'Rahman,

Petitioner.

On Petitions for
a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and
an Original Writ of Habeas Corpus and Other Extraordinary Relief

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APPENDIX

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March 18, 2002

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NOT RECOMMENDED FOR PUBLICATION

FILED

Nos. 98-6568/6569, 01-6504

JAN 1 8 2002

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LEONARD GREEN, Clerk

ABU-ALI ABDUR'RAHMAN, Petitioner-Appellant, v. RICKY BELL, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

Before: SILER, BATCHELDER and COLE, Circuit Judges.

SILER, Circuit Judge. This matter comes before the court on the application by Abdur' Rahman for a certificate of appealability, a request that his Fed.R.Civ.P. 60(b) appeal be heard initially en banc and a motion to consolidate his Rule 60(b) appeal with pending motions in Nos. 98-6568/6569 to withhold mandate, grant a rehearing en banc, and remand. For the reasons stated hereafter, insofar as we have the authority, the motions are denied.

His application for a certificate of appealability arises from the transfer by the district court of this matter after he had applied for relief from judgment under Fed.R.Civ.P. 60(b). Petitioner moved the district court for relief from judgment under Rule 60(b) based upon the fact that Tennessee Supreme Court Rule 39 was just adopted on June 28, 2001, in which it stated:

> In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error.

> Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tenn. Code. Ann. § 39-13-206, a claim presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

The petitioner raised it in a Rule 60(b) motion because this case was appealed to the Tennessee Supreme Court after 1967 and the district court in this case found that certain claims were barred by the failure of the petitioner to seek discretionary review from the Tennessee Supreme Court. ***See Abdur'Rahman v. Bell***, 999 F. Supp. 1073, 1080-82 (M.D. Tenn. 1988). The district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas corpus petition, ***see McQueen v. Scroggy***, 99 F.3d 1302, 1335 (6th Cir. 1996), so it transferred this case to our court for a determination of whether the Rule 60(b) motion satisfied the gateway criteria of 28 U.S.C. § 2244(b).

We consider that this is the equivalent of a successive habeas corpus petition, so it is necessary to determine whether the petition meets the criteria of 28 U.S.C. § 2244(b)(2). Abdur'Rahman has not been able to meet these criteria. First, he does not rely upon a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court. Second, there is no factual predicate for the claim which could not have been discovered previously through the exercise of due diligence. Finally, he does not show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found him guilty of the offense charged. Instead, his argument rests upon a state procedural rule, adopted three years after the district court's judgment. The district

court properly found that the claims were then unexhausted for failure to present them before the Tennessee Supreme Court under the authority of ***Silverburg v. Evitts***, 993 F.2d 124, 126 (6th Cir. 1993). In addition, the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default. ***See Abdur'Rahman v. Bell***, 226 F.3d 696 (6th Cir. 2000).

Therefore, the application for a certificate of appealability is denied. The motions or requests that the Rule 60(b) appeal be heard initially en banc and to consolidate the Rule 60(b) appeal with pending motions in Nos. 98-6568/6569 are not matters which this panel can resolve, because they should be decided by the en banc court. Thus, all relief requested to this panel is denied.

NOT RECOMMENDED FOR PUBLICATION

Nos. 98-6568/6569; 01-6487; 01-6504

FILED

FEB 11 2002

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR RAHMAN,

Petitioner - Appellant.

v.

RICKY BELL, Warden,

Respondent - Appellee.

ORDER

Before: SILER, BATCHELDER, and COLE, Circuit Judges

These cases are before the court upon the motions of the petitioner to withhold issuance of the mandate in Nos. 98-6558/6569, the appeal and cross-appeal from the decision of the district court on the application for a writ of habeas corpus, and to rehear the cases en banc or remand to the district court for further proceedings. Petitioner has also moved that the court hear en banc No. 01-6504, his appeal from the judgment of the district court finding his Rule 60(b) motion to be a second or successive habeas corpus petition subject to 28 U.S.C.§2244 and transferring it as such to this court, and to consolidate it with the pending motions in Nos. 98-6568/6569, the latter request having been the subject of a supplemental motion filed February 8, 2002. Additionally, petitioner has asked for rehearing en banc of the panel's January 18, 2002 order denying, inter alia, his request for a certificate of appealability in No. 01-6504; petitioner has supplemented

that request for en banc review with a statement of additional authority. Finally, petitioner has applied for leave to file a new habeas corpus petition in No. 01-6487.

The requests for en banc consideration have not been favored by a majority of the active judges of the court, and the matter is referred to the original panel. Upon consideration of the pleadings noted above, it is the decision of the court that:

- Petitioner's motion for rehearing of Nos. 98-6568/6569 is hereby DENIED
- Petitioner's motion to consolidate No. 01-6504 with Nos. 98-6568/6569 is hereby DENIED
- The mandate of the court in Nos. 98-6568/6569 shall issue forthwith
- The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition and transferring it to the court of appeals is not an appealable order in No. 01-6504, which is therefore DISMISSED for lack of jurisdiction
- The motions for initial hearing en banc of No. 01-6504 and for rehearing of the court's denial of a certificate of appealability in the matter are hereby DENIED
- The application for leave to file a second habeas corpus petition, as transferred to this court by the district court in No. 01-6487, is DENIED. As we stated in an opinion filed in Nos. 98-6568/6569; 01-6504 on January 18, 2002, "...the decision of this court on appeal from the judgment of the district court did not rest upon any procedural default."

With this order the court's review of Nos. 98-6568/6569, 01-6487, and 01-6504 is hereby concluded.

IT IS SO ORDERED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN	)	
	)	
v.	)	No. 3:96-0380
	)	JUDGE CAMPBELL
RICKY BELL, Warden	)	DEATH PENALTY

ORDER

Pending before the Court is Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) (Docket No. 254). Because the Motion is a second or successive petition subject to 28 U.S.C. § 2244, this case is transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6th Cir. 1997).

Petitioner, in this capital habeas corpus case, has moved pursuant to Fed. R. Civ. P. 60(b) for relief from this Court's Judgment of April 8, 1998 (Docket Nos. 205 and 206). Abdur'Rahman v. Bell, 999 F.Supp. 1073 (M.D. Tenn. 1998), aff'd. in part and rev'd. in part, 226 F.3d 696 (6th Cir. 2000), cert. denied, 122 S.Ct. 386 (2001), pet. for reh'g pending. The Rule 60(b) Motion is predicated upon a new Tennessee Supreme Court Rule, Rule 39 ("Rule 39"), adopted on June 28, 2001.[1]

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[1] Tennessee Supreme Court Rule 39 reads as follows:

In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for a rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim. On automatic review of capital cases by the Supreme Court pursuant to Tennessee Code Annotated, § 39-13-206, a claim (continued...)

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267

In the 1998 Judgment, this Court ruled that certain of Petitioner's claims had not been exhausted in state court and, therefore, were defaulted. Based on new Rule 39, Petitioner asserts that a petition for discretionary review by the Tennessee Supreme Court is not necessary for exhaustion purposes and, therefore, the claims in question were exhausted and the Court must now rule on the merits of those claims.

Respondent asserts that this Rule 60(b) Motion is actually a second or successive petition subject to 28 U.S.C. § 2244. The proper procedure, according to Respondent, is for this Court to transfer the matter to the Sixth Circuit for its determination of whether the Rule 60(b) Motion satisfies the gateway criteria of 28 U.S.C. § 2244(b). Respondent relies primarily on McQueen v. Scroggy, 99 F.3d 1302, 1335 (6th Cir. 1996). In McQueen, the Sixth Circuit held "[w]e agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition...." Id. See, also, United States v. Rich, 141 F.3d 550, 551 (5th Cir. 1998); Thompson v. Calderon, 151 F.3d 918, 921 (9th Cir. 1998) (en banc); Felker v. Turpin, 101 F.3d 657, 660-61 (11th Cir. 1996); and United States v. Hernandez, 158 F.Supp.2d 388, 391 (D. Del. 2001).

Petitioner argues that this Rule 60(b) Motion is not a second or successive petition because it raises no new claims, no new facts, and does not rely on new law. Petitioner relies primarily on Rodriquez v. Mitchell, 252 F.3d 191, 198-200 (2nd Cir. 2001). In Rodriquez, the Second Circuit held "a Motion under Rule 60(b) to vacate a judgment denying habeas is not a

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[1](...continued)
presented to the Court of Criminal Appeals shall be considered exhausted even when such claim is not renewed in the Supreme Court on automatic review.

Tenn. S. Ct. R. 39.

second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)." Id. at 198.

In the Sixth Circuit, when a petitioner raises new matters in a Rule 60(b) Motion challenging the previous denial of a § 2254 habeas corpus petition, the Rule 60(b) Motion must be construed as an attempt by the petitioner to file a second or successive petition. McQueen v. Scroggy, 99 F.3d at 1334-35. 28 U.S.C. § 2244(b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

Because this Rule 60(b) Motion presents a new theory predicated on a new rule of law adopted by the Tennessee Supreme Court over three years after this Court's Judgment, the Court finds that the Motion is a second or successive habeas petition subject to 28 U.S.C. § 2244. Accordingly, this Court is without jurisdiction to decide the Rule 60(b) Motion. The case is hereby transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6th Cir. 1997).

It is so ORDERED.

Todd Campbell

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN	)	
	)	
v.	)	No. 3:96-0380
	)	JUDGE CAMPBELL
RICKY BELL, Warden	)	DEATH PENALTY

ORDER

Pending before the Court is Petitioner's Application for Certificate of Appealability (Docket No. 269). For the reasons described herein, the Court is without jurisdiction to rule on the Application.

By Order (Docket No. 267) entered on November 27, 2001, the Court ruled that it was without jurisdiction to decide Petitioner's Rule 60(b) Motion because the Motion was a second or successive petition subject to 28 U.S.C. § 2244. The Court, accordingly, ordered the case transferred to the Sixth Circuit Court of Appeals pursuant to 28 U.S.C. § 1631 and In re Sims, 111 F.3d 45 (6th Cir. 1997).[1]

Petitioner's Application for Certificate of Appealability asks the Court to grant a certificate of appealability. See 28 U.S.C. §§ 2253(c); Fed. R. App. P. 22(b); Slack v. McDaniel, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). According to Petitioner:

> Specifically, a COA should issue because reasonable jurists could disagree (and have disagreed) with this Court's conclusions that: (1) Every 60(b) motion in a habeas case is a second or successive

[1] The Court also notes that this case was on appeal at the time the Rule 60(b) Motion was filed in this Court and that it remains on appeal at this time. Therefore, the Court generally lacks jurisdiction over the case due to the appeal. See First Nat'l Bank of Salem, Ohio v. Hirsch, 535 F.2d 343 (6th Cir. 1976) regarding the procedure for a District Court to act on a Rule 60(b) motion to vacate a judgment that is on appeal.

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petition; (2) Tennessee Supreme Court Rule 39 is a "new" rule of law; and (3) Abu-Ali Abdur'Rahman is not entitled to relief, despite egregious prosecutorial misconduct, including deliberate falsification of evidence pivotal to the death sentence.

Application, Docket No. 269, p. 1.

For the reasons stated in the prior Order (Docket No. 267), the Court finds that it does not have jurisdiction to rule on Petitioner's Application for Certificate of Appealability.

The Clerk shall send a copy of this Order to the Clerk of the Sixth Circuit Court of Appeals.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN	)	
	)	
v.	)	No. 3:96-0380
	)	JUDGE CAMPBELL
RICKY BELL	)	

ORDER

Petitioner, Abu-Ali Abdur' Rahman, has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth in the accompanying Memorandum, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. Petitioner shall remain incarcerated as described in the Memorandum.

It is so ORDERED.

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a) FRCP, on 4-8-98 By: JAC

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

ABU-ALI ABDUR' RAHMAN	)	
	)	
v.	)	No. 3:96-0380
	)	JUDGE CAMPBELL
RICKY BELL	)	

MEMORANDUM

I. Introduction

Petitioner, Abu-Ali Abdur' Rahman[1], has been sentenced to death by electrocution for first degree murder. He has filed a Petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, challenging both his conviction and sentence. The Court held an evidentiary hearing in this matter beginning on February 6, 1998. For the reasons set forth below, the Court issues the writ of habeas corpus as to Petitioner's death sentence, but denies issuance of the writ as to Petitioner's conviction.

The basis of the Court's opinion, as is described in detail herein, is that Petitioner was unconstitutionally sentenced to death because he did not receive the effective assistance of counsel guaranteed by the Sixth Amendment. This Court, along with the state post-conviction trial and appellate courts, finds that trial counsel for Petitioner failed to adequately represent their client. This Court further finds that Petitioner was seriously prejudiced by utterly ineffective assistance of counsel at his sentencing hearing. Trial counsel, for instance, failed to investigate

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[1] Petitioner has changed his name from James Lee Jones to Abu-Ali Abdur' Rahman.

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(a) FRCP, on 4-9-98 by WRC

(20E)

and inform the jury about Petitioner's unstable mental history and bizarre family background. The jury, as a result, did not hear significant mitigating evidence before deciding whether to sentence Petitioner to death. This is not to suggest that Petitioner, or anyone with an unstable mental history or bad childhood, cannot be sentenced to death. However, a sentence of death must be imposed in accordance with the Constitution and in this case was not. This is not a case where counsel presented the jury with most of the available mitigation evidence and merely missed some evidence. This is not an instance of harmless error. Despite an abundance of mitigating evidence, there was virtually a complete failure by counsel to present a defense to the jury at Petitioner's sentencing. Accordingly, as is more fully discussed in Section VIII, Ineffective Assistance of Counsel, the Constitution has been violated and the writ of habeas corpus must issue as to Petitioner's death sentence.

II. Proceedings in the State Courts

Petitioner was tried and convicted of first degree murder, assault with intent to commit murder, and armed robbery. (Addendum 1, at 2000). After a subsequent sentencing hearing, Petitioner received the death penalty for the first degree murder conviction. The jury found the existence of three aggravating circumstances: (1) Petitioner had been convicted of prior violent felonies (assault with a deadly weapon and second degree murder); (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while the Petitioner was engaged in committing or attempting to commit a first

degree murder or robbery. (Addendum 1, 1986-2001). The court sentenced the Petitioner to life on each of the other offenses, to be served consecutively to each other. (Addendum 1, at 13-14).[2]

Petitioner was represented at trial by Lionel Barrett and Sumter Camp. After trial, Mr. Barrett and Mr. Camp withdrew, and the state court appointed Richard Dinkins to represent Petitioner on direct appeal to the Tennessee Supreme Court. (Addendum 1, Technical Record, at 87). The Tennessee Supreme Court affirmed Petitioner's conviction and sentence. State v. Jones, 789 S.W.2d 545 (Tenn. 1990).

The state court appointed another attorney to assist Mr. Dinkins in the post-conviction proceedings, who was joined by a volunteer lawyer from the Capital Case Resource Center. (Addendum 11, Technical Record, at 23, 50, 82). The post-conviction trial court found trial counsel had been ineffective in their representation of Petitioner at sentencing. (Addendum 11, at 81-109). The court, however, went on to find that trial counsel's deficiencies did not result in prejudice to the Petitioner and rejected all other claims. (Id.) The Tennessee Court of Criminal Appeals[3] affirmed that judgment, and the Tennessee Supreme Court denied Petitioner's application for permission to appeal. Jones v. State, 1995 WL 75427, at *2 (Tenn. Crim. App. Feb. 23, 1995).

The post-conviction trial court gave the following summary of facts in its opinion:

---

[2] The court also determined that, if the death sentence were to later be reduced to a life sentence, that sentence would be served consecutively to the other life sentences. (Addendum 1, at 14). In addition, the state sentences would be served consecutively to the federal sentence for which Petitioner was on parole when he was convicted of the state offenses. (Id.)

[3] The panel consisted of only two judges, rather than the usual three judges.

> The facts are that petitioner and his codefendant, Harold Deval Miller, went to the victims home. Petitioner wants to describe the events that took place after that as a misguided attempt to rid the community of drug dealers, as it appears that the victim, Patrick Daniels, was a small time marijuana dealer. Codefendant, Mr. Miller, testified for the State, however, and he described the motive for the visit as robbery. The victim, Patrick Daniels, lived with Norma Norman. Petitioner and Miller entered the home and bound Daniels and Norman. What happened next is described in the appellate decision.
>
> > The victim in this case was bound, gagged, and blind folded with duct tape. He was distressed, crying, and begging not to be hurt. Defendants stood over him and stabbed him six (6) times, four (4) times penetrating the heart. He then watched as the victim went into convulsions, blood spewing from his nose and mouth. His accomplice testified, "he was working himself up on a rhythm," he was "cool" and "under control." The victim continued to plead with the defendant as he was being stabbed.
>
> State v. Jones, supra, at 550. The defendant also stabbed Norma Norman numerous times, but she miraculously survived the attack.

(Addendum 11, 83-84).

III. Proceedings in this Court

Prior to the evidentiary hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(1), (4), C8) were unconstitutional. (Docket Nos. 123, 124). The Court granted summary judgment to the Respondent on the following claims: the Batson challenge (Amended Petition, at ¶ C2(2)); exclusion of jurors based on religious beliefs (¶¶ C2(3),(4)); failure to exclude certain jurors for cause (¶ C2(5)); sufficiency of evidence of robbery and first degree murder (¶ C3); inadequate proportionality review (¶ C9); prosecutor's questions during guilt phase (¶ D4); prosecutorial misconduct involving publication of indictments to jury (¶D6); cross examination

of Petitioner at sentencing (¶ D7); and State's argument at sentencing regarding the Southeastern Gospel Ministry (¶ D8(4)). (Docket Nos. 156, 157). The Court denied summary judgment on Petitioner's conflict of interest and ineffective assistance of counsel claims, having found the existence of a factual dispute. (Id.) The Court denied Respondent's motion for summary judgment on procedural default issues because Petitioner raised factual issues regarding actual innocence in response to the motion. (Docket Nos. 133, 134).[4]

IV. Procedural Defenses

A. Generally

Respondent argues that the Court should not reach the merits of several of Petitioner's claims because Petitioner failed to raise those claims in state court, and has, therefore, procedurally defaulted those claims. Petitioner argues that none of his claims are procedurally defaulted because: (1) all the claims Petitioner raises have been presented to the state courts; (2) the ineffectiveness of Petitioner's counsel in the state courts and prosecutorial misconduct provide cause for any failure to raise a claim; and (3) Petitioner is actually innocent of the crime for which he has been convicted, and of the death penalty.

Subsections (b) and (c) of 28 U.S.C. § 2254 require a habeas corpus petitioner to exhaust the remedies available to him in state court before raising claims in federal court. If the petitioner has no remedy currently available in state court, however, the exhaustion requirement is satisfied. Gray v. Netherland, 518 U.S. 152, 116 S.Ct. 2074, 2080 (1996); Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334 (1989).

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[4] Respondent also filed a Motion in Opposition to an Evidentiary Hearing (Docket No. 110), which the Court denied. (Docket No. 116).

Although a claim may be fully exhausted under these circumstances, the petitioner's failure to assert the claim in state court may constitute procedural default. Id. As a general rule, procedural default bars the petitioner from raising claims in a federal habeas corpus proceeding that he failed to raise in state court. Id. A petitioner may avoid this procedural bar by showing cause for the default, and that prejudice resulted from the default, or by showing that he is actually innocent. Id.; Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995).

B. Exhaustion

First, Petitioner argues that his claims are not procedurally defaulted because they have all been exhausted. Exhaustion requires that petitioners "fairly presen[t]" federal claims to the state courts to provide them with an opportunity to correct alleged violations of its prisoners' federal rights. Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). A claim has been "fairly presented" if the petitioner identified the specific constitutional guarantee allegedly violated, as well as a statement of the facts which entitle the petitioner to relief. Gray, 116 S.Ct. at 2081.

It is not enough to make a general reference to a constitutional guarantee as broad as due process to present the substance of such a claim to a state court. Gray, 116 S.Ct. at 2081.

Petitioner argues that many of his claims[5] are exhausted because the Tennessee Supreme Court had the independent duty to review each claim that could be based upon the record on appeal even if the claim was not raised by the Petitioner. Petitioner cites Tennessee Code Annotated Section 39-2-205(a), which was in effect at the time of Petitioner's trial, to support his argument.

That statute provided for automatic direct review by the Tennessee Supreme Court where the death penalty has been imposed. Tenn. Code Ann. § 39-2-205(a). The statute required that the court review the death sentence to determine: (1) whether the sentence was imposed in an arbitrary fashion; (2) whether the evidence supported the findings of an aggravating

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[5] Those claims are as follows: whether the indictments against Petitioner violated his Fifth, Eighth and Fourteenth Amendment rights (Amended Petition, ¶ C1); whether Petitioner was denied his rights under the Sixth, Eighth and Fourteenth Amendments because he was not permitted to question potential jurors in voir dire regarding their beliefs about parole eligibility (¶ C2(1)); whether the evidence was sufficient to support Petitioner's conviction of assault (¶ C3(3)); whether the trial court erred in instructing the jury that it could return a verdict finding Petitioner guilty of either premeditated murder, felony murder, or both (¶ C4(1)); whether voir dire, arguments and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation in a manner that violated Tennessee law (¶ C4(2)); whether the trial court erred instructing the jury regarding lesser included offenses (¶ C4(3)); whether the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (¶ C4(4)); whether the trial court gave an erroneous definition of reasonable doubt in its instructions to the jury by use of the language "moral certainty" (¶ C4(5); ¶ C7(3)); whether Tennessee law unconstitutionally prohibits presentation of certain specified issues at a capital sentencing hearing (¶ C5); whether the trial court unconstitutionally instructed the jury regarding the felony murder aggravating circumstance (¶ C7(2), ¶ C8); whether the trial court unconstitutionally instructed the jury that sympathy could not be a factor in its sentencing decision (¶ C7(5)); whether the sentencing instructions as a whole were unconstitutional (¶ C6); whether jury instructions regarding mitigating circumstances at the sentencing phase of the trial were unconstitutional (¶¶ C7(6),(7),(8),(9),(10),(11),(12),(13),(14),(15)); whether the Tennessee Death Penalty Statute is unconstitutional (¶ C10); whether the prosecution made improper closing argument at the guilt phase of trial regarding the term "pure pleasure" (¶ D5(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶ D8(1)-(3),(5)-(8)).

circumstance(s); (3) whether the evidence supported the finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance(s) so found; and (4) whether the death sentence is disproportionate to the penalty imposed in similar cases. Tenn. Code Ann. § 39-2-205(c) (repealed and replaced by Tenn. Code Ann. § 39-13-206(c)(1)).

The Court is not persuaded that this statute excuses the requirement that the Petitioner present issues to the state courts in the first instance, at least with respect to issues not specifically delineated in the statute. Accepting Petitioner's argument would essentially eviscerate the exhaustion requirement because defendants would have no incentive to raise issues in the state court. The exception Petitioner advocates would also undermine the principles of comity and federalism upon which the exhaustion requirement is based. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991). Accordingly, the statutory requirement that the Tennessee Supreme Court review a death sentence does not satisfy the exhaustion requirement as to those issues not addressed in the statute.[6]

Petitioner argues that the exhaustion doctrine does not require a petitioner to seek discretionary review of a claim before the state's highest court. Petitioner argues that presentation of claims to the Tennessee Court of Criminal Appeals on appeal of the denial of his post-conviction petition was sufficient for purposes of exhaustion because that was the last court to which he was entitled to appeal as of right. Although there is a split of authority on the issue, see Dolny v. Erickson, 32 F.3d 381, 383-84 (8th Cir. 1994)(and cases cited therein), the Sixth Circuit has held that a petitioner must seek discretionary review of a claim from a state's highest

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[6] Respondent does not allege that Petitioner's claims that track the statute are procedurally defaulted.

court in order to satisfy the exhaustion requirement. Silverburg v. Evitts, 993 F.2d 124, 126 (6th Cir. 1993). That the Tennessee Supreme Court exercises only discretionary review of post-conviction matters, therefore, does not excuse the Petitioner from raising his claims before that court.[7]

Petitioner argues other claims are exhausted for various reasons. First, Petitioner argues that he has exhausted his claim that the evidence at trial was insufficient to support his conviction of assault by presenting it to the Tennessee Supreme Court in his application for discretionary review. (Amended Petition, ¶ C3(3)). Petitioner contends that he presented this claim to the court because it is related to his argument that the evidence was insufficient to support premeditation and deliberation, in that both claims involve Petitioner's condition at the time of the offense. The Court is not persuaded, however, that this claim was fairly presented to the court simply because Petitioner's mental state was a basis for both claims. Thus, Petitioner's sufficiency of the evidence supporting assault claim has not been exhausted.

With respect to his claim that voir dire, arguments and instructions to the jury unconstitutionally defined the elements of premeditation and deliberation (Amended Petition, ¶ C4(2)), Petitioner argues that he raised the substantial equivalent of this claim by arguing that the evidence was insufficient to support a finding of premeditation or deliberation under State v. Brown, 836 S.W.2d 530 (Tenn. 1992), a case involving jury instructions on these elements. Resolving a sufficiency of the evidence claim, however, does not require a court to determine

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[7] Petitioner contends that his ineffective assistance of appellate counsel claim (Amended Petition, ¶ F) is exhausted based on this argument. Given the Court's rejection of this argument, the exhaustion doctrine applies to bar this claim.

whether the court erred in its jury instructions. This claim was not fairly presented to the state court, and therefore, has not been exhausted.

Petitioner next argues that he has exhausted his claim that the trial court erred by failing to instruct the jury that accomplice testimony must be corroborated by independent evidence (Amended Petition, ¶ C4(4)). Petitioner contends that he raised the substantial equivalent of this claim by arguing to the Tennessee Supreme Court on direct appeal that it was fundamentally unfair to predicate his first degree murder conviction solely on the basis of the uncorroborated testimony of co-defendant Harold Devalle Miller. But, as stated above, resolving Petitioner's fundamental fairness claim would not require the court to review the jury instructions on this particular issue. Accordingly, this claim was not fairly presented to the state courts, and has not been exhausted.

Petitioner argues that his claim challenging the constitutionality of the Tennessee Death Penalty Statute (Amended Petition, ¶ C10) was raised on direct appeal to the Tennessee Supreme Court, because he stated in his brief:

> D. As Applied To The Facts Of This Case, The Imposition Of The Death Penalty Constitutes A Deprivation Of Due Process Of Laws, Equal Protection Of Laws And Cruel And Inhuman Treatment In Violation Of The Fifth, Eighth And Fourteenth Amendments To The United States Constitution And Article I, Sections Eight And Sixteen Of The Tennessee Constitution And, Further, Is Disproportionate To The Sentence Imposed In Similar Cases
>
> In addition to the arguments set forth in Section II A, B, C and D, supra., defendant submits that, taking this case as a whole, the imposition of the death penalty was improper and constitutes a deprivation of life without due process of law and cruel and inhuman treatment. . .

(Brief of the Appellant, at 59 (Addendum 2)). The brief then goes on to address the proportionality issue.

Despite the language in the heading, the brief does not specify, "as applied to the facts of this case," why the death penalty statute is unconstitutional, and what facts support the constitutional challenge. Under these circumstances, the Court concludes that Petitioner did not fairly present his constitutional challenge to the Tennessee Supreme Court on direct appeal.

Petitioner also points out that he challenged the "heinous, atrocious and cruel" aggravating circumstance in his post-conviction application for permission to appeal to the Tennessee Supreme Court. In a footnote, the brief states: "By discussing only the aggravating circumstance of 'heinous, atrocious or cruel,' *infra*, the Appellant does not waive any previously raised constitutional challenges. The Appellant relies on the arguments previously advanced and ruled upon in his Brief to the Court of Criminal Appeals." (Application For Permission To Appeal, at 21 n.11 (Addendum 15)).

Although the Petitioner referred, in this footnote, to the brief he filed in the Court of Criminal Appeals, he did not attach a copy of that brief to the Application. The Court is not persuaded that referral to arguments made in another document by way of a footnote constitutes a fair presentation of those arguments to the Tennessee Supreme Court. Thus, the Court concludes that this claim has not been exhausted.

In his Amended Petition, Petitioner alleges a number of instances of prosecutorial misconduct, numbered one through eight, with several subissues under each number. In a paragraph under the main heading "Prosecutorial Misconduct," Petitioner states that the prosecution "pursued a consistent course of deception," which violated Petitioner's constitutional

rights (Amended Petition, (¶ D)). Respondent has asserted a procedural default defense to most of the claims set forth under this heading.

Petitioner argues, however, that the heading "prosecutorial misconduct," along with the paragraph following that heading, constitute a separate claim to which the Respondent has not asserted a procedural default defense. But the Court does not view this paragraph as a separate claim. The paragraph does not allege specific constitutional violations, nor does it set forth specific facts in connection with those alleged violations. Therefore, Respondent will not be considered to have waived his procedural default defense to the prosecutorial misconduct claims.

For this same reason, the Court rejects Petitioner's argument that certain specific allegations are not defaulted because they fall within this general prosecutorial misconduct claim.[1]

Petitioner contends that his claims regarding the failure to disclose co-defendant Miller's pretrial statements (Amended Petition, ¶¶ D1(2) -(4)) were fairly raised to the Tennessee Supreme Court in his application for permission to appeal because, in that application, he argued that the prosecution made misleading statements in its argument to the jury. (Application For

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[1] These claims include: whether the prosecution should have disclosed the statements of Norman's children (¶ D1(5)), the redacted portion of Detective Garafola's Report (¶ D1(6)), other police reports (¶ D1(8)), the memorandum in the prosecution's file concerning a bank account in Patrick Daniels' name (¶ D1(9)), the statement of George Daniels/laboratory reports (¶¶ D1(10)(11)), and information regarding Petitioner's bank account (¶ D1(12)). These claims also include whether the prosecution unconstitutionally influenced Harold Devalle Miller's testimony (¶ D2(1)); whether the prosecution provided false information to MTMHI (¶ D2(2)); whether the prosecution improperly attempted to manipulate Norma Norman's testimony (¶ D2(3)); whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's 1972 murder conviction (¶ D3); whether the prosecution made improper closing arguments at the guilt phase of trial (¶¶ D5(1)-(4)); and whether the prosecution's argument during sentencing violated Petitioner's constitutional rights (¶¶ D8(1)-(3),(5)-(8)).

Permission To Appeal, at 9 (Addendum 15)). The Petitioner also argued that the prosecution committed discovery violations, but did not mention Miller's pretrial statements.

The Court is not persuaded that this discovery violation claim has been fairly presented to the Tennessee Supreme Court. Determining whether a prosecutor has made a misleading closing argument is not the same as determining whether the prosecution committed a discovery violation. Thus, Petitioner has not exhausted this claim.

Petitioner next contends that he has exhausted his claim that the prosecution provided misleading statements to the Middle Tennessee Mental Health Institute ("MTMHI"). (Amended Petition, ¶ D2(2)). Petitioner argues that he raised his claim in his application for permission to appeal to the Tennessee Supreme Court by reciting the facts upon which the claim is based. Although Petitioner discussed the prosecutor's letter to MTMHI in the "Statement of the Facts" section of the application, he did not raise this issue in arguing that the prosecution had engaged in misconduct. (Application For Permission To Appeal, at xii-xiii, 7-19 (Addendum 15)). The prosecutorial misconduct claims presented to the Tennessee Supreme Court were limited to Petitioner's allegations that the prosecution failed to disclose certain documents in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and that the prosecution made a misleading closing argument. (Id.) Although Petitioner alleged facts regarding the prosecution's letter to MTMHI, he did not identify the constitutional violation allegedly shown by those facts. Thus, this claim was not fairly presented to the Tennessee Supreme Court, and has not been exhausted.

Respondent argues that Petitioner's ineffective assistance of counsel claim is procedurally defaulted except as to the claim that defense counsel conducted a deficient investigation of

Petitioner's mental history (Amended Petition, ¶¶ E1-E2(g)). Petitioner raised the ineffective assistance of counsel claim in his post-conviction petition, and described twenty-seven alleged deficiencies by defense counsel. (First Amended Petition For Post-Conviction Relief, at 3-6 (Addendum 11)). As noted above, the trial court held that defense counsel conducted an inadequate investigation of Petitioner's background and mental health history, but determined that Petitioner was not prejudiced by that deficiency. (Memorandum and Order of the Fifth Circuit Court For Davidson County (Addendum 11)). The Court of Criminal Appeals agreed with that assessment. Jones v. State, 1995 WL 75427 (Tenn. Crim. App. Feb. 23, 1995).

In his application for permission to appeal to the Tennessee Supreme Court, Petitioner argued that prejudice had been shown. (Application For Permission To Appeal, at 1-6 (Addendum 15)). Because Petitioner succeeded in demonstrating that trial counsel's performance was deficient in the lower courts, it was not necessary for the Petitioner to raise all those deficiencies again in arguing that his appeal of the prejudice issue should be accepted. The Court concludes that Petitioner fairly presented the ineffective assistance of counsel claims to the Tennessee Supreme Court.[9]

In conclusion, the only claims that have been exhausted by Petitioner and remain to be decided by this Court are: Petitioner's prosecutorial misconduct claims involving certain lab reports and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1), (7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance

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[9] For the same reason, the Court also concludes that Petitioner has exhausted his claim that trial counsel failed to test the adversarial process. (Amended Petition, ¶ A).

(Amended Petition, ¶¶ A, E1-E2(g)).[10] With the exception of these claims, Petitioner has failed to exhaust all the claims to which Respondent has asserted a procedural default defense. Petitioner may no longer present those claims to the state court, however, because they would be barred by the statute of limitations. See Tenn. Code Ann. § 40-30-202.[11] Thus, because Petitioner has no remedy currently available in state court, these claims are procedurally defaulted. See Hannah v. Conley, 49 F.3d 1193, 1196-97 (6th Cir. 1995).

C. Cause and Prejudice

Petitioner argues that even if his claims are the subject of procedural default, the default should be excused because he can establish cause for the default, and that prejudice resulted from the default. Petitioner also argues that the default should be excused to prevent a fundamental miscarriage of justice in that he is actually innocent.[12]

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[10] Respondent has asserted a procedural default defense as to Petitioner's claim that the cumulative effect of all errors at trial violated Petitioner's due process rights. (Amended Petition, ¶ B). In his brief, Petitioner indicates that this is not a separate claim for habeas relief, but is an argument to be considered in determining whether the state court's alleged errors should be considered harmless. Therefore, the Court will not consider this argument as a separate claim.

[11] Section 40-30-202(a) is part of the Post-Conviction Procedure Act of 1995, Tenn. Code Ann. §§ 40-30-201, et seq. With some exceptions not applicable here, Section 202(a) provides that a petition for post-conviction relief must be brought within one year of the date of the final action of the highest state appellate court to which an appeal is taken. The previous post-conviction statute required that a petition be filed within three years of the date of the final action of the highest state appellate court to which an appeal was taken. Tenn. Code Ann. § 40-30-102 (repealed 1995).

The Tennessee Supreme Court denied Petitioner's petition to rehear, on direct appeal, on May 14, 1990. (Addendum 7). Therefore, Petitioner would be barred, under either statute, from seeking to raise these claims through a post-conviction proceeding in state court.

[12] Petitioner also argues that certain state procedural rules should not prevent (continued...)

In order to establish cause, a petitioner must show the procedural default was the result of ineffective assistance of counsel, or "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). A petitioner may rely on ineffective assistance of counsel to establish cause only if he has presented that claim to the state courts as an independent constitutional claim, and he shows that counsel's incompetence rises to the level of a constitutional violation. 106 S.Ct. at 2645-46.

In order to demonstrate that an objective impediment provided cause for a procedural default, a petitioner may show, for example, that "the factual or legal basis for a claim was not reasonably available to counsel," or that "'some interference by officials'" made compliance with the procedural rule impracticable. Murray, 106 S.Ct. at 2645 (citations omitted).

The cause and prejudice standard applies to claims that were defaulted on appeal as well as those defaulted at trial. Murray, 106 S.Ct. at 2646.

In this case, Petitioner has presented an independent ineffective assistance of trial counsel claim that is not procedurally defaulted. Petitioner has not specified, however, any errors made by trial counsel that prevented any issues from being raised on appeal. In other words, in reviewing Petitioner's case on direct appeal, the Tennessee Supreme Court did not dismiss any of

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(...continued)
adjudication of claims by this Court. It does not appear, however, that Respondent relies on state procedural rules to bar Petitioner's claims. Instead, Respondent argues that the claims at issue were not raised at all in the state courts. See Teague, 109 S.Ct. at 1069; Coleman v. Thompson, 111 S.Ct. at 2557 n. 1.

Petitioner's claims based on the failure of trial counsel to preserve those issues at trial. See State v. Jones, 789 S.W.2d 545 (Tenn. 1990).

Petitioner may not establish cause by alleging the ineffectiveness of appellate counsel in failing to present certain issues on appeal because this claim has not been presented to the state courts. (See Footnote 7, and accompanying text).[13]

Finally, Petitioner may not establish cause by alleging that post-conviction counsel were ineffective in failing to raise certain issues to the state courts. There is no constitutional right to an attorney in state post-conviction proceedings, and therefore, a petitioner cannot claim constitutionally ineffective assistance of counsel regarding those proceedings. Coleman, 111 S.Ct. at 2566.[14]

Petitioner also argues that cause is established by the "widespread prosecutorial abuse and judicial bias" which tainted the trial and prevented post-conviction counsel from gaining "an adequate picture of the circumstances surrounding the crime and Petitioner's life." (Petitioner's Memorandum In Response To Respondent's Summary Judgment Motions And In Support Of An Evidentiary Hearing, at 50 (Docket No. 113)). Petitioner does not, however, specify how failure to raise a particular claim on direct appeal or during the post-conviction proceeding was impeded by the prosecution or the state court trial judge. Under these circumstances, the Court is not

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[13] In any event, the Court notes that a defendant does not have a constitutional right to have every nonfrivolous issue raised on appeal. See Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 3312-14, 77 L.Ed.2d 987 (1983).

[14] Furthermore, Petitioner has stated that he "is no longer pursuing the issue of ineffective assistance of post-conviction counsel." (Petitioner's Response To Motion To Compel Disclosure Of Documents From His State Court Attorneys' Files, at 2 (Docket No. 140)).

persuaded that an objective impediment prevented Petitioner from presenting claims to the state courts.

In conclusion, Petitioner has not demonstrated cause for his procedural default. Consequently, the Court need not determine whether prejudice resulted from the procedural default.

D. Actual Innocence

A petitioner who is unable to demonstrate cause and prejudice for a procedural default may nonetheless avoid a procedural default bar by demonstrating that he is actually innocent. Murray, 106 S.Ct. at 2649. In order to fall within the actual innocence exception to the procedural default bar, a petitioner must provide evidence that negates an element of the crime for which he was convicted, or demonstrates that he was not eligible for the death penalty under the applicable state law. Sawyer v. Whitley, 505 U.S. 333, 112 S.Ct. 2514, 2521-22, 120 L.Ed.2d 269 (1992).

A petitioner who claims he is actually innocent of the crime for which he was convicted must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup, 115 S.Ct. at 867 (quoting Murray v. Carrier, 106 S.Ct. at 2649-2650). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Id. This standard requires "a stronger showing than that needed to establish prejudice." Id. (footnote omitted).

To be credible, this claim of actual innocence "requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory

scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." Schlup, 115 S.Ct. at 865.

In order to establish actual innocence of the death penalty, a petitioner must provide "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner" eligible for the death penalty under the applicable state law. Sawyer, 112 S.Ct. at 2517. In order to make this showing, the petitioner must focus on those elements which render a defendant eligible for the death penalty, e.g., aggravating circumstances, and not on additional mitigating evidence that was not introduced at sentencing. Sawyer, 112 S.Ct. at 2523.

Petitioner claims he is actually innocent of first degree premeditated murder based on (1) the testimony of a forensic pathologist regarding blood splattering at the scene of the stabbings; (2) the testimony of a psychiatric expert that Petitioner was insane at the time of the stabbings, and lacked the capacity to deliberate and premeditate; and (3) the lack of credibility of the testimony of the co-defendant, Harold Devalle Miller. Petitioner also claims he is actually innocent of felony murder because there was insufficient proof of the underlying felony -- theft.[15]

First, Petitioner argues that certain blood splattering evidence supports his claim of actual innocence. At the hearing in this Court, Petitioner presented the testimony of Dr. Kris Sperry, a

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[15] Although he mentions it in his brief, Petitioner does not appear to have asserted a freestanding actual innocence claim (that execution of one who is actually innocent violates the Eighth Amendment) in his Amended Petition. In any event, the standard for this claim is even higher than that set forth in Schlup. Therefore, the Court is not persuaded that Petitioner has established actual innocence as a separate claim. Schlup, 115 S.Ct. at 860-62; Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993); Carriger v. Stewart, 132 F.3d 463, 476-77 (9th Cir. 1997).

forensic pathologist, who opined that the assailant would have had blood from the victims' wounds splattered on his body and his clothing. (Transcript of Hearing Beginning on February 6, 1998 ("Transcript"), at 37-38, 77). Petitioner points out, however, that crime lab reports indicate there were no blood stains found on clothes, a coat and two pair of work pants, seized from the Petitioner's apartment two days after the stabbings. (Lab Report, Petitioner's Exhibit 117; Search Warrant, Petitioner's Exhibit 115).

On the other hand, there is no evidence that during the stabbings, Petitioner was wearing the clothes later seized from his apartment. Norma Norman testified that Petitioner was wearing a black coat when he arrived at the apartment. (Addendum I, at 1342-1343). Because Petitioner taped her eyes before the stabbings were committed, however, she could not testify that he was wearing the coat during the stabbings. (Addendum I, at 1375-1378). There was no evidence that he was wearing one of the two pair of pants seized from his apartment two days after the stabbings, or that he had not disposed of the pants worn during the crime.[16]

Although this evidence may have provided a good argument for defense counsel to raise to the jury, the Court is not convinced that reasonable jurors probably would not have convicted Petitioner if they had been presented with this evidence.

Moreover, both Dr. Sperry and Petitioner conveniently overlook the fact that Petitioner admitted that he was guilty at the sentencing phase of the trial:

> ... But what I am saying is, I'm going to submit to the fact that I am the individual that committed these particular felonies or assaults upon these two people. But I don't remember -- you know, I don't remember too much of why

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[16] Petitioner's failure to dispose of his coat may be explained by his fondness for the coat, which was given to him by his wife as a birthday gift. (Addendum I, at 1454-1455).

that all of a sudden came to me. All I know is that I'm the man that stabbed Mr. Daniel Patricks (sic) and I'm the man that assaulted Ms. Norma Jean Norman.

(Addendum I, at 1865).

> The only thing that I can recollect is that, when I was over there on this young lady and realized that what I was doing -- I had stopped. The purpose to me, you know, I didn't want -- go over there to hurt nobody. But it was her that I seen underneath me that made me stop. And God spared her life. And after that I left.

(Addendum I, at 1866-67).

> Q. And you heard Mr. Miller testify from the very seat that you're in right now, that you were the man who stabbed Mr. Daniels to death. And you knew it when you were setting there, that that was true, didn't you?
>
> A. That I was the man, yes.

(Addendum I, at 1893. See also Addendum I, at 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

Next, Petitioner argues that the testimony of Dr. Robert Sadoff supports his claim of actual innocence. Dr. Sadoff opined that, at the time of the stabbings, Petitioner was insane because he lacked the substantial capacity to conform his conduct to the requirements of the law. (Transcript, at 523-524).[17] Dr. Sadoff testified that Petitioner was suffering from Post-Traumatic Stress Disorder, which is a mental illness. (Transcript, at 455, 457). Dr. Sadoff also diagnosed Petitioner as having a Borderline Personality Disorder, a mental disorder. (Id.)

The Court is not persuaded that Dr. Sadoff's testimony is sufficient to meet the Schlup actual innocence standard. First, Dr. Sadoff's diagnosis comes almost twelve years after the

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[17] This was the applicable standard for establishing an insanity defense under Tennessee law at the time of Petitioner's trial. See, e.g., State v. Clayton, 656 S.W.2d 344, 346 (Tenn. 1983).

crime, and Dr. Sadoff admitted that the passage of time made it more difficult for him to render a diagnosis. (Transcript, at 584-585). On the other hand, a mental evaluation of the Petitioner conducted shortly after the stabbings found that Petitioner was competent to stand trial, and that an insanity defense could not be supported. (Petitioner's Exhibit 150). The evaluation was performed by the staff of MTMHI after observing the Petitioner over a thirty-day period in residence. (Id.) Dr. Craddock, who was a member of the MTMHI team that evaluated Petitioner, testified at the hearing in this case. (Transcript, at 83-163). Although the MTMHI staff did not possess all the Petitioner's previous institutional records at the time they made their diagnosis, that diagnosis should not be given less weight than one made twelve years later.

In addition, Dr. Sadoff's opinion is based primarily on Petitioner's claim that he could not remember the stabbings. (Transcript, at 569). Consequently, Dr. Sadoff opined that Petitioner was probably "dissociating" at the time of the stabbings. (Transcript, at 517-518). As a result, according to Dr. Sadoff, if Petitioner was dissociating, he lacked substantial capacity to conform his conduct to the requirements of the law, or to engage in premeditation and deliberation. (Transcript, at 523-524, 564).

But Petitioner has not always professed an inability to recall the stabbings. The MTMHI records indicate that Petitioner stated he "remembers everything that happened" at the time of the stabbings. (MTMHI Staff Conference Report dated February 19, 1987, Petitioner's Exhibit 150; Transcript, at 97). Nor has Petitioner adhered to the same story. Shortly after his arrest, Petitioner claimed that a third party, Sam Blackstock, was involved in the stabbings. (Transcript, at 210-212). That story turned out to be false. (Id.) Finally, although Petitioner insists that the Court should not rely on Petitioner's testimony during the sentencing hearing, Petitioner clearly

admitted his guilt at that time. (Addendum I, at 1865-1867; 1893-1894; 1957; 1961; and 1968). Because Dr. Sadoff's opinion strongly relies on the questionable, self-serving statements of the Petitioner, the Court does not attach a great deal of weight to that opinion.[18]

Petitioner also argues that he is actually innocent because the testimony of co-defendant Miller, which indicated that Petitioner committed the stabbings pursuant to a preconceived plan, is not credible. But this argument is not supported by any "new" evidence, as contemplated by Schlup, 115 S.Ct. at 865. See also McCoy v. Norris, 125 F.3d 1186, 1190-91 (8th Cir. 1997). Furthermore, the Court is not persuaded that pointing out every inconsistency in Miller's testimony would have led the jury to change its verdict. See Sawyer, 112 S.Ct. at 2524 (evidence "brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness'] account of petitioner's actions"). In other words, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Miller's credibility problems.

Petitioner also fails to present new evidence regarding the robbery. Instead, Petitioner argues that none of the witnesses saw the Petitioner take $300 from the apartment, and that it was

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[18] These would include the statements made by the Petitioner while under hypnosis. Dr. Sadoff admitted that there is no way to determine whether the statements made by the Petitioner while under hypnosis are objective fact. (Transcript, at 504-505, 507, 508, 572, 575). The Court notes that Petitioner did not testify at the hearing to memories purportedly recalled during hypnosis.

During the hearing, the Court held that the hypnosis tape offered by the Petitioner was admissible for the limited purpose of establishing what Dr. Sadoff relied upon in forming his opinion. (Transcript, at 505-516). The Court also determined that the hypnosis tape did not satisfy the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and declined to admit the statements made on the tape for the truth of the events leading up to and include the stabbings. (Id.).

just as plausible, based on the evidence, that someone else had taken the money. As the Court has determined in a previous Order (Docket Nos. 156, 157), although the evidence was circumstantial, it was still sufficient to allow the jury to find the elements of robbery beyond a reasonable doubt. Consequently, Petitioner has failed to show that "no reasonable juror" would have voted to find him guilty in light of Petitioner's arguments regarding the lack of sufficient evidence.

Petitioner also argues that this new evidence also shows he is actually innocent not only of the crime, but also of the death penalty. As discussed above, the Schlup Court has pointed out that the standard for establishing actual innocence of the death penalty, set forth in Sawyer, is stricter than that required to show actual innocence of the capital crime. The stricter standard requires Petitioner to provide clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty. For the reasons explained above, the Court concludes that Petitioner has not shown actual innocence of the death penalty.

Because Petitioner has not established cause and prejudice, or actual innocence, he may not avoid the procedural default of the claims to which Respondent has asserted a procedural default defense. Accordingly, the Court will only address the following claims: Petitioner's prosecutorial misconduct claims involving certain lab reports and the transcript from Petitioner's 1972 murder trial (Amended Petition, ¶¶ D1(1), (7)), and Petitioner's claim that his trial counsel provided constitutionally ineffective assistance (Amended Petition, ¶¶ A, E1-E2(g)).

V. The Trial Court's Instructions Regarding the "Heinous, Atrocious or Cruel" Aggravating Circumstance and Unanimity

Prior to the hearing in this case, the Court denied Petitioner's motion for summary judgment on his claims that the trial court's sentencing instructions regarding the heinous, atrocious, or cruel aggravating circumstance, and unanimity (Amended Petition, ¶¶ C7(1), (4), C8) were unconstitutional. (Docket Nos. 123, 124). For the reasons stated in that opinion, those claims are without merit, and are dismissed.

VI. Brady Violations

As noted above, two of Petitioner's Brady[19] claims have been exhausted and are properly before this Court. Petitioner claims that the prosecution should have provided trial counsel with the transcript of his trial in 1972 for murder because, he contends, it would have supported an insanity or mental illness defense. (Amended Petition, ¶¶ D1 (1)). Petitioner also claims that the prosecution should have provided the crime lab analysis indicating that no blood was found on the clothes seized from Petitioner's apartment. (Amended Petition, ¶¶ D1 (7)).

In a series of cases beginning with Brady v. Maryland, 83 S.Ct. at 1196-97, the Supreme Court has held that the prosecution must disclose exculpatory evidence to the defense, with or without request. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Suppression of this evidence violates due process if the evidence is material either to guilt or to punishment, regardless of the good faith of the prosecutor. Id.

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[19] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Withheld evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 105 S.Ct. at 3383. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. 105 S.Ct. at 3384. A showing of materiality does not require the defendant to show that the suppressed evidence would have resulted in the defendant's acquittal. 105 S.Ct. at 3383-84. Materiality is concerned with whether suppression of the evidence undermines confidence in the outcome of the trial. 105 S.Ct. at 3381.

The Supreme Court recently reaffirmed this standard for determining materiality in Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 1567-68, 131 L.Ed.2d 490 (1995). The Court pointed out that "materiality" is not a sufficiency of the evidence test, which would require a defendant to show insufficient evidence to convict after discounting the inculpatory evidence in light of the undisclosed evidence. 115 S.Ct. at 1566. Rather, the defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. (footnote omitted).

The Court explained that in considering materiality, a reviewing court is to assess the collective effect of the suppressed evidence in light of the evidence presented at trial. 115 S.Ct. at 1567. Finally, the Court pointed out that, once constitutional error is found under this standard, there is no need for further harmless-error review because the error cannot be found harmless. 115 S.Ct. at 1566-67.

On appeal of the denial of Petitioner's state post-conviction petition, the Tennessee Court of Criminal Appeals considered this issue as follows:

> Appellant next contends that his conviction and sentence were the result of prosecutorial misconduct because the state failed to provide him with exculpatory material as required by Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In order to establish a violation of Brady, appellant must prove (1) the prosecutor suppressed evidence, (2) that the suppressed evidence would have been favorable to the defendant and (3) the materiality of the suppressed evidence.
>
> The evidence claimed to have been suppressed consisted of the transcript of the defendant's 1972 federal murder trial, lab reports on clothing seized from appellant's apartment, a police report about appellant's violent behavior at the time of his arrest, statements by his accomplice, Harold Devalle Miller, a police report suggesting that property belonged to one victim rather than the other, and information relative to the appellant's bank account. None of the above evidence was favorable to the defense. We find no merit to the appellant's claim of prosecutorial misconduct.

Jones v. State, 1995 WL 75427, at *3 (Tenn. Crim. App. Feb. 23, 1995).

Whether a Brady due process rights violation has occurred presents a mixed question of law and fact which is reviewed de novo. Brown v. Cain, 104 F.3d 744, 750 (5th Cir. 1977); Reese v. Delo, 94 F.3d 1177, 1183 (8th Cir. 1996); Hays v. Alabama, 85 F.3d 1492, 1498 (11th Cir. 1996).

In 1972, Petitioner was tried in a Virginia federal court for the murder of a fellow prisoner, Michael Stein. (Petitioner's Exhibit 131). He was convicted of second degree murder. (Exhibit 105). At that trial, a psychiatrist, Dr. Asot M. Masri, opined that Petitioner had been in a "homosexual panic" when he stabbed Stein.[20] (Petitioner's Exhibit 131, at 48). He testified that the Petitioner had a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). The Government called another psychiatrist, Dr. Robert Eardley, who

[20] Dr. Masri characterized homosexuality as a mental disease. (Petitioner's Exhibit 131, at 51).

opined that Petitioner was not suffering from a mental disease when he stabbed Stein. (Petitioner's Exhibit 131, at 57-58, 59, 66).

Petitioner argues that this evidence was exculpatory because the State argued at trial that Petitioner did not suffer from any emotional disturbance.

There is no dispute that the prosecutor had this transcript in his possession at some point before trial began. There is also no dispute that he did not provide the transcript to the defense.[21] Respondent contends that the state court was correct in concluding that the transcript was not favorable to the defense because neither psychiatrist opined that the Petitioner was insane.

The Court believes this information was favorable to the Petitioner because the Petitioner had stated his intention to rely on a mental illness defense at trial and sentencing (Transcript, at 959-60, 963), and Dr. Masri's testimony supported that defense. The Court is not persuaded,

[21] During the hearing, the prosecutor explained his reasoning:

> Based on all the testimony, I concluded for two reasons, one the lapse of time or I guess you might say the distance in time between the two events and what I call very weak testimony from the defense psychiatrist at the trial, that it was not exculpatory, would have no bearing on explaining whether at the time of this crime he had a mental illness or suffered from any kind of emotional snapping, because the situation in the federal prison was one where even taken in light most favorable to the defendant was triggered as a result of a sexual assault on him.
>
> That wasn't the case here where the defendant sought out the victim and went to the victim and pursued the victim.

(Transcript, at 1015-16).

As for mitigation, the prosecutor testified that his interpretation of the psychological testimony was that during the previous killing, the Petitioner "got angry and snapped." (Transcript, at 1016). There was no evidence, according to the prosecutor, that there were any external circumstances operating on the Petitioner during the 1986 crime. (Id.)

however, that the prosecution's failure to provide the transcript to defense counsel rises to the level of a due process violation because Dr. Masri's testimony was not "material."

In a later section of this Memorandum, the Court concludes that Petitioner received ineffective assistance of counsel because his trial counsel failed to investigate his mental health history, background and other areas of mitigation. The Court is not persuaded, however, that "the proceeding would have been different" if the prosecution had disclosed Dr. Masri's testimony to Petitioner's trial counsel. Petitioner's trial counsel already had various clues that should have led them to investigate Petitioner's mental health history, such as the records of Petitioner's evaluation at MTMHI before trial, and conversations with Petitioner's wife. There is no reason that Dr. Masri's testimony should have been the key element prompting Petitioner's counsel to take action.

Similarly, admission of this testimony as an item of evidence during the guilt phase of the trial would not have affected the result. Had Petitioner's defense counsel hired an expert to opine that Petitioner was insane at the time of the stabbings in 1986, Dr. Masri's testimony about an incident in 1972 could have supported that opinion, but it certainly would not have been vital. Absent an insanity defense, there would be no reason to admit this evidence relating to a prior crime during the guilt phase of the trial.

As for the sentencing phase, Dr. Masri's testimony would have served as an item of mitigation relating both to the prior murder conviction, and to his mental history. But that testimony is only one item of evidence that, as the Court explains below, should have been introduced by trial counsel during the sentencing hearing as mitigation evidence. Standing alone,

the Court is not persuaded that the absence of Dr. Masri's testimony undermines confidence in the outcome of the sentencing hearing.

As for the lab reports finding that no blood was found on clothing seized from Petitioner's apartment, there has been no evidence that the prosecutor kept this evidence from the defense. The prosecutor testified that he provided the lab reports to Petitioner's first trial counsel, Neal McAlpin, and Mr. McAlpin testified that he received them. (Transcript, at 223-25, 227, 925). Furthermore, the prosecutor testified that he filed the reports with the trial court as part of his response to the Petitioner's discovery request. (Transcript, at 911, 926; Supplemental Response Number Two To Defendant's Request For Discovery, Exhibit 19). Under these circumstances, the Court concludes Petitioner's Brady claim regarding these lab reports is without merit.

Accordingly, the Court concludes that Petitioner's Brady claims are without merit, and are dismissed.

VII. Trial Counsel's Conflict of Interest

Petitioner claims that one of his trial attorneys, Lionel Barrett, had an irreconcilable conflict of interest in representing Petitioner because he was paid a $5,000 retainer by Southeastern Gospel Ministry ("SEGM") member Alan Boyd to represent the Petitioner, and was promised an additional $10,000 that was never paid (Amended Petition, at ¶ E1).[22] Sometime after his arrival in Nashville, Petitioner joined SEGM, a nascent religious group that had as its goal "cleaning up" the African-American community by eliminating illegal activities, primarily

[22] $5,000 was inadequate to investigate and prepare this complex case for trial.

drug dealing. (Addendum 11, at 15-16). Petitioner's boss, Alan Boyd, co-defendant Miller, and William Beard were also members of the group. (Id.). Petitioner and co-defendant Miller both worked for Mr. Boyd at National Baptist Publishing.

Petitioner contends that Mr. Boyd had interests adverse to the Petitioner because Mr. Boyd and SEGM allegedly knew about and took part in the plan to visit the apartment of Patrick Daniels before the stabbings, and met with the Petitioner and co-defendant Miller after the stabbings. According to the Petitioner, Mr. Boyd retained Mr. Barrett and refused to pay him the full retainer with the effect of preventing Mr. Barrett from investigating the role of SEGM and Mr. Boyd in the crime.

In order to establish a Sixth Amendment violation, the Petitioner must show that an actual conflict of interest affected his lawyer's performance. Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3120, 97 L.Ed.2d 638 (1987); United States v. Mays, 77 F.3d 906, 908 (6th Cir. 1996).[23] Whether facts give rise to a conflict of interest is a mixed question of fact and law, which is to be reviewed de novo. Mays, 77 F.3d at 908.

In reviewing the denial of Petitioner's post-conviction petition, the Tennessee Court of Criminal Appeals found that Mr. Barrett did not know the funds he received came from SEGM member Alan Boyd. Jones v. State, 1995 WL 75427, at * 3 (Tenn. Crim. App. Feb. 23, 1995). Petitioner argues that this finding is not fairly supported by the record because Gail Hughes

[23] To the extent Petitioner argues that he is not required to show that the conflict "affected his lawyer's performance," this argument has been soundly rejected. See, e.g., Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984); Wilson v. Rogers, 125 F.3d 856 (Table), 1997 WL 615767 (6th Cir. Oct. 3, 1997).

Mann, who delivered the money to Mr. Barrett, testified at the post-conviction hearing that she told Mr. Barrett that the money came from Mr. Boyd. (Addendum 11, at 13).

Both Mr. Barrett and Ms. Mann testified in a hearing before this Court. Mr. Barrett was quite certain he was not aware the funds came from Mr. Boyd. (Transcript, at 294, 410). Ms. Mann, on the other hand, was more tentative:

> Q. Did you tell him where the money came from?
> A. I don't remember that. I don't know if I told him or not . I probably did. I don't know.
> Q. In the post-conviction proceeding you testified you did tell Mr. Barrett?
> A. Probably so.
> Q. Can you testify to that today?
> A. That I told him?
> Q. Yes.
> A. I don't remember. I don't know. I might have told him. If I say I told him back then, I did then tell him.

(Transcript, at 1281). In her subsequent testimony, Ms. Mann was a bit more definite that she had told Mr. Barrett the source of her funds, Mr. Boyd, would not be providing any more funds. (Transcript, at 1288).

Based on the testimony of Mr. Barrett and Ms. Mann, the Court concludes that Mr. Barrett was not aware that Mr. Boyd was the source of the fee, even if Ms. Mann happened to mention it in a conversation with him. Even if Mr. Barrett was aware of the source of the fee, the Court is not persuaded that it affected his representation.

Petitioner argues that the conflict of interest led Mr. Barrett to fail to request attorneys' fees and funds for expert support services. Petitioner also argues this conflict led Mr. Barrett to delay representation and to refuse to ask for a continuance.

In order to accept Petitioner's argument, the Court must find that the source of Mr. Barrett's fees had interests contrary to Petitioner's interest. But, as noted above, the Petitioner himself testified at sentencing that SEGM did not order him to commit the crimes for which he was convicted.

Moreover, even if Mr. Boyd's interests were adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing. Mr. Barrett elicited testimony about another SEGM member, William Beard, during cross-examination of Mr. Miller at the trial. (Addendum 1, at 1527, 1567). He also elicited testimony about SEGM from the Petitioner at the sentencing hearing, including testimony that Mr. Boyd supplied him with a shotgun, and William Beard supplied Mr. Miller with a pistol. (Addendum 1, at 1837-1848, 1855-1856).[24] Mr. Barrett also mentioned the Petitioner's connection with the group during his argument. (Addendum 1, at 1960). In addition, Mr. Barrett issued subpoenas for Mr. Boyd and Mr. Beard to appear at the trial. (Transcript, at 358).

During the evidentiary hearing in this Court, in response to a question by the Court, Mr. Barrett stated:

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[24] According to co-defendant Devalle Miller's testimony at the post-conviction proceeding, Alan Boyd met with Petitioner and Miller right after the murder of Patrick Daniels, and William Beard helped Miller leave town shortly thereafter. (Addendum 11 at 26-30). Mr. Boyd purchased the shotgun carried by Petitioner during the murder from a gun dealer in 1983, according to a firearms trace report. (Docket No. 200).

Alan Boyd and William Beard both asserted their Fifth Amendment privilege against self-incrimination at depositions taken in this case. Boyd and Beard effectively refused to answer any questions. (Petitioner's Exhibits 148, 149).

> Your Honor, I am as certain as a person can be from something that happened 10 years ago that I absolutely had no knowledge that these funds came from Mr. Boyd.
>
> For the sake of argument only -- even if I had been told these funds came from Allen Boyd, I would have had absolutely no hesitancy in going after him in any way I could and would think he had wasted his money if that is what he was attempting to do.
>
> I am absolutely certain that there was no decision, no single issue of strategy, not one question that Mr. Camp or I asked or did not ask had anything to do with the source of the funds that came from Ms. Hughes or from Allen Boyd.

(Transcript, at 410).

The Court is not persuaded that any alleged conflict of interest affected the performance of Mr. Barrett at trial or sentencing. Accordingly, Petitioner's conflict of interest claim is without merit, and is dismissed.

VIII. Ineffective Assistance of Counsel

A. Generally

Petitioner contends that trial counsel was ineffective during the guilt phase and during the sentencing phase of his trial (Amended Petition, at ¶ E2). In order to prevail on an ineffective assistance of counsel claim, the burden is on the Petitioner to show: (1) trial counsel's performance was deficient; and (2) actual prejudice resulted from the deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064-68, 80 L.Ed.2d 674 (1984); O'Hara v. Wigginton, 24 F.3d 823, 828 (6th Cir. 1994).

In order to demonstrate that trial counsel's performance was deficient, a petitioner must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 104 S.Ct. at 2064. The petitioner must

show that trial counsel's performance, fell below an objective standard of reasonableness, measured by "prevailing professional norms." Id.

In analyzing trial counsel's performance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 104 S.Ct. at 2065. The petitioner must overcome the presumption that the challenged action by counsel was sound trial strategy. Id.

One of the duties of counsel is the duty to investigate his client's case. 104 S.Ct. at 2066. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id.

In order to show actual prejudice, a petitioner must show there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2068. A reasonable probability is a "probability sufficient to undermine confidence in the outcome." Id.

Thus, when a petitioner challenges his conviction on ineffective assistance of counsel grounds, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt about guilt. 104 S.Ct. at 2068-69. When the petitioner challenges a death sentence, the question is whether there is a reasonable probability that, absent the errors, the sentencer would have concluded that "the balance of aggravating and mitigating circumstances did not warrant death." 104 S.Ct. at 2069. In assessing prejudice, the court is to assume that "the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 104 S.Ct. at 2068.

The ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed de novo. 104 S.Ct. at 2070; McQueen v. Scroggy, 99 F.3d 1302, 1311 (6th Cir. 1996).

Petitioner's contention that his trial counsel, Lionel Barrett and Sumter Camp, were ineffective was first raised on direct appeal by Petitioner's substitute counsel, Richard Dinkins. Petitioner argued that trial counsel should have presented evidence of Petitioner's mental incapacity at sentencing. (Addendum 2, at 57-59). In addressing this claim, the Tennessee Supreme Court stated: "There is no evidence in this record or any other part of [the Petitioner's] extensive criminal record to indicate he was either incompetent to stand trial or at the time this offense was committed. There is nothing in this record to indicate a remand for a determination of defendant's mental status would be appropriate." State v. Jones, 789 S.W.2d at 552.

Petitioner raised this issue again in his post-conviction petition. Petitioner based his contention that counsel was ineffective on over twenty separate grounds. (First Amended Petition For Post Conviction Relief, Addendum 11). At the post-conviction hearing, Petitioner's counsel called Petitioner's initial attorney, Neal McAlpin; trial counsel, Lionel Barrett and Sumter Camp; and appellate counsel, Richard Dinkins. (Addendum 11). Petitioner also called Gail Hughes Mann; Petitioner's co-defendant, Harold Devalle Miller; Petitioner's wife, Susi Bynum Jones; and a psychiatrist, Dr. Barry Nurcombe. (Id.)

The post-conviction trial court found that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental health history. (Memorandum and Order entered August 26, 1993, Addendum 11). Specifically, the post-conviction court found that trial counsel failed to investigate as follows:

1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.

2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.

3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological assessment at age 14 by the school psychologist at DuPont Jr. High School at Ft. Lewis, Washington.

4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.

5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.

6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.

7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.

8. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.

9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington, D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI per their request.

10. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's institutional records while in the federal prison system.

11. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.

12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.

13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

(Memorandum and Order entered August 26, 1993, at 5-6, Addendum 11) (footnote omitted) (emphasis in original).

The court concluded, however, that the failure to investigate did not prejudice the Petitioner because his background also contained harmful information. (Id.)

The Tennessee Court of Criminal Appeals agreed with the trial court's decision:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial.

Jones v. State, 1995 WL 75427, at *2.

During the evidentiary hearing in this Court, Petitioner called all the witnesses who testified at the post-conviction proceeding except Dr. Nurcombe and Mr. Miller. In addition, Petitioner presented, for the first time, the live testimony of Petitioner's half-sister, Nancy Lancaster; Petitioner's former fiancé, Sarah Roberts Walton; co-defendant Miller's former attorney, Ross Alderman; mental health experts, Dr. Sadoff, and Dr. Nancy McCoy; Dr. Ray Winbush; and legal expert Brian Stephenson. Petitioner also presented, for the first time, the testimony of Detective Mark Garafola, Elmer H. Bishop, William Delagrange, and Richard Bretzlauf by deposition. (Petitioner's Exhibits 110, 135, 136, 152).

During their testimony before this Court, Mr. Barrett and Mr. Camp admitted most of the deficiencies alleged by the Petitioner. Mr. Barrett was first requested to represent the Petitioner in October, 1996. (Transcript, at 326). During the next month, Petitioner's initial counsel, Neal McAlpin, began to withdraw from representation. (Transcript, at 233-234). Mr. Barrett did not begin actually working on the case, however, until March, 1987. (Transcript, at 336-337). On April 20, 1987, Mr. Barrett first requested the help of Mr. Camp, who was an associate with Mr. Barrett's firm at that time. (Transcript, at 271-272, 342, 691). Mr. Camp first began work on the file sometime after May 11, 1987. (Transcript, at 691-692). Mr. Barrett took the lead in the case, and Mr. Camp's role was to assist him. (Transcript, at 695, 723). Trial was set for July 6, 1987. (Transcript, at 338).

Trial counsel had three to four months to prepare for trial. The investigation they conducted during this time was wholly inadequate. Mr. Barrett admits that he did not obtain Mr. McAlpin's file in the case, or discuss the case in any kind of depth with Mr. McAlpin, even though Mr. McAlpin suggested that he do so. (Transcript, at 240-242, 277, 279, 722). Because of that failure, and the subsequent failure to inspect the court file, Petitioner's trial counsel were not aware of the lab reports indicating that no blood was found on clothes seized from Petitioner's apartment. (Transcript, at 277, 292, 322, 341, 331-333). Counsel also failed to respond to a request, sent to Mr. McAlpin, from MTMHI staff for background information to be used in their psychiatric evaluation of the Petitioner. (Transcript, at 242-243, 331-333).

Mr. Barrett failed to request Petitioner's extensive mental health records, or his educational, prison, or military records. (Transcript, at 280-281). This was a serious failure.

Although Mr. Barrett prepared a motion requesting that the trial court declare his client indigent, and approve funds for investigative and expert services, he did not file the motion. This was a significant error. (Transcript, at 278, 363-367, 701).[25] Mr. Barrett did not consult or hire a mental health expert to perform an independent mental evaluation of his client. (Transcript, at 278, 718-719). This was a grave omission.

Mr. Barrett did not introduce any information from the MTMHI records relating to Petitioner's background or mental history at the trial or at sentencing. (Transcript, 725). Trial counsel received the MTMHI records only a couple of weeks prior to the trial, and neither recall speaking with any of the MTMHI staff about their report. (Transcript, at 280, 282, 352, 716-717). These were substantial errors.

Petitioner's attorneys did not call anyone in Petitioner's family to testify during the sentencing hearing. Mr. Barrett testified that someone in his office contacted Petitioner's brother, Mark Jones, before trial, but he refused to assist in Petitioner's defense. (Transcript, at 286-289). Mr. Camp testified that he did not contact the Petitioner's brother. (Transcript, at 710). At the post-conviction hearing, Petitioner introduced an affidavit from Mark Jones[26] indicating that he had not been contacted by Mr. Barrett's office. (Petitioner's Exhibit 74; PC Exhibit 67). It is undisputed that Petitioner's attorneys did not contact Petitioner's half-sister, Nancy Lancaster, even though she would have been available and willing to testify at the time of

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[25] The Motion was prepared three days after jury selection began. (Transcript, at 727). A post-trial motion for indigent status was approved. (Transcript, at 376; Petitioner's Exhibit 88).

[26] Mark Jones committed suicide on July 13, 1996. (Transcript, at 793).

trial. (Transcript, at 832). Mr. Barrett did not contact Petitioner's former fiancé, Sarah Roberts Walton, even though the Petitioner told Mr. Barrett about her. (Transcript, at 356). These were significant mistakes.

Finally, Mr. Barrett failed to investigate the nature of Petitioner's prior convictions.[27] (Transcript, at 281, 708-709, 714-715). This was a substantial error.

As the trial date approached, Mr. Camp suggested that they request a continuance to conduct further investigation, but Mr. Barrett did not act on that suggestion. (Transcript, at 279, 705). This was a serious deficiency.

Although both these attorneys have good reputations in the bar, their performance in this case was clearly inadequate. Mr. Barrett critiqued his own performance as follows:

> I think as the trial progressed and on looking back on it now, I think that I should have sought out further psychiatric evaluation. I think it became evident during the course of the trial that Mr. Jones -- and in Mr. Camp's opinion and my opinion had some psychiatric or psychological issues we may not have fully realized early on in the case. . . Based upon the documents that I have now seen subsequent to the trial, I feel that my performance certainly did not satisfy the standards that I adhere to myself as far as pursuing the psychiatric aspect, particularly at the sentencing hearing.

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[27] Mr. Barrett testified that the prosecutor introduced him to FBI Agent William Delagrange at trial, and that the agent said he would testify that Petitioner's 1972 conviction was the result of a "drug turf war," and not a homosexually-related killing, as Petitioner contended. (Transcript, at 294-299). Given his failure to investigate Petitioner's prior convictions, Mr. Barrett did not have any independent information about the conviction, and therefore, did not introduce mitigating evidence about this conviction at the sentencing hearing. (Transcript, at 299). As discussed herein, the 1972 conviction was not over drugs and gangs as represented by the prosecution to defense counsel. The murder concerned homosexual conduct that the jury could have found more mitigating.

(Transcript, at 394-395).[28]

Mr. Camp's assessment was even more negative. He testified that he agreed with the state courts that his representation was deficient:

> We did not present the information to this jury so that they would know James Jones, so that in deciding whether he was to live or die they would know this man, they would know this human being. That was our failure.
>
> • • •
>
> . . . [W]e didn't give the jury any reason to oppose death on James Jones. We didn't explain to them how James Jones came to be in that courtroom facing them.

(Transcript, at 734, 741, 766).

Thus, this Court, like the state post-conviction trial court and appeals court, finds that trial counsel's performance during the guilt phase and during sentencing was deficient. Unlike those courts, however, this Court concludes that Petitioner suffered prejudice as a result of that deficiency during the sentencing phase of this trial.

Before addressing prejudice at sentencing, the Court will consider whether trial counsel's deficiencies prejudiced Petitioner as to the guilt phase of the trial. Petitioner argues he was

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[28] Shortly after the trial, defense counsel realized the need to fully consider Petitioner's mental state. Mr. Barrett wrote Mr. Camp the following memorandum on August 26, 1987:

> You will get a copy of communication from James Lee Jones saying that he thinks he is going to get the Nobel Peace Prize. I think he is probably crazy. I think that we should move to have him psychiatrically evaluated prior to the sentencing hearing in view of the United States Supreme Court decision that you cannot execute a person that is crazy. I also think that in the sentencing provision in the code there is some indication that a person can be psychatrically [sic] evaluated. We need to get this done as soon as possible and I would appreciate it if you could prepare the paperwork.

(Petitioner's Exhibit 85).

prejudiced because trial counsel did not introduce the lab report indicating that no blood was found on clothes seized from Petitioner's apartment, and because trial counsel failed to obtain an expert to support an insanity defense.

The Court is not persuaded that if trial counsel had presented the lab report to the jury, they would have had a reasonable doubt about guilt. As discussed above, there is no evidence that Petitioner was wearing the clothes seized from his apartment during the stabbings.[29]

Similarly, the Court is not persuaded that trial counsel's presentation of a mental health expert to testify on behalf of the Petitioner would have left the jury with a reasonable doubt about Petitioner's guilt. It is not clear that trial counsel would have found an expert to testify that Petitioner was insane at the time of the stabbings. As noted above, Dr. Sadoff's opinion that Petitioner was insane at the time of the offense comes some twelve years after the crime. Furthermore, any testimony to this effect would have been countered by the prosecution with MTMHI's opinion that there was no basis for Petitioner to invoke an insanity defense. Thus, the Court concludes that Petitioner suffered no prejudice at the guilt stage as a result of trial counsels' deficiencies.

As for sentencing, however, the Court concludes that there is more than a reasonable probability that, had trial counsel introduced the mitigation evidence they would have had available after a reasonable investigation, the result of the sentencing would have been different.

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[29] Petitioner also ignores the fact that he admitted his guilt at sentencing. (Addendum I, at 1865, lines 5-12; 1866, line 25 through 1867, line 6; 1893, lines 4-8; 1894, lines 7-10; 1957, lines 18-19; 1961, lines 22-25; 1968, lines 19-23).

The Court is of the opinion that the complete lack of mitigation evidence at sentencing undermines confidence in the outcome of the sentencing.

In evaluating the prejudice at sentencing, it is important to keep in mind the nature of mitigation evidence during the sentencing proceeding. In the "eligibility" phase of the sentencing proceeding, the jury narrows the class of defendants "eligible" for the death penalty, generally by determining whether certain well-defined aggravating circumstances are applicable to the case. Buchanan v. Angelone, ___ U.S. ___, 118 S.Ct. 757, 761, ___ L.Ed.2d ___ (1998); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980). During the "selection" phase, the jury determines whether to impose the death penalty on a particular defendant. Buchanan, 118 S.Ct. at 761. In regard to making this "selection" decision, the Supreme Court has "emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." Id. Indeed, the Court has consistently held that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Id.

Mitigating evidence relevant to the selection decision includes "'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 2946, 106 L.Ed.2d 256 (1989). As the Supreme Court has explained: "If a sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who

have no such excuse.'" 109 S.Ct. at 2947 (quoting California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)). The sentencing decision should reflect "a reasoned moral response to the defendant's background, character, and crime." Id.

Thus, there is a broad array of evidence that is considered to be relevant to mitigation. In addition, the rules of evidence do not apply to the presentation of that evidence. During the relevant time period, Tennessee Code Annotated Section 39-2-203 (c) provided:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(Exhibit 155).[30] Consequently, Petitioner's counsel were not constrained by evidentiary restrictions in introducing mitigation evidence at sentencing.

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[30] Thus, this Court has used a similar standard in determining whether prejudice has been established in light of the evidence that could have been admitted at the sentencing hearing. In that regard, the Court notes that Rule 7 of the Rules Governing Section 2254 Cases provides that the habeas corpus record may be expanded "by the inclusion of additional materials relevant to the determination of the merits of the petition." Habeas Corpus Rule 7(a). The Rule indicates that copies of letters, documents, exhibits, and affidavits may be included in the expanded record. Habeas Corpus Rule 7(b). The court "may require" the authentication of material added to the record under the Rule. Habeas Corpus Rule 7(d). Thus, Rule 7 contemplates a relaxed application of the hearsay, best evidence, authentication, and other evidentiary rules under the Federal Rules of Evidence. Liebman, Federal Habeas Corpus Practice and Procedure, § 19.5, at 532 (2d ed. 1994).

In this case, there was an abundance of mitigation evidence available that was never used at trial. For example, trial counsels' reasonable investigation would have produced information about Petitioner's childhood abuse by his father, a military policeman. Trial counsel could have introduced evidence about this abuse through descriptions contained in some of Petitioner's mental health records, through the testimony of Petitioner's step-sister, Petitioner's wife, Petitioner's now-deceased brother, and Petitioner's former fiancé.[31]

During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. (Transcript, at 786, 818, 822-823, 832, 838-839). Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.

Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. (Transcript, at 786-787). Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. (Transcript at 787).[32] Petitioner's mother later married Petitioner's father, James Jones, Sr.

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[31] The affidavit of Mark Jones, Petitioner's deceased brother, which was introduced at the post-conviction hearing, confirms Petitioner's statements about the abuse and other difficulties he encountered during his childhood. (Mark Jones Affidavit, ¶ 5, Petitioner's Exhibit 74). Sarah Roberts Walton and Susi Bynum testified in this Court about Petitioner's previous statements to them that he had suffered abuse as a child. (Transcript, at 1191-1192; February 19, 1987 – MTMHI Social History, Petitioner's Collective Exhibit 150).

[32] As a result, Ms. Lancaster was unable to testify as to her age or birthday. (Transcript at 787). The taxi driver went back to the woods, retrieved the children, and turned them over to the state. Id.

(Transcript, at 793-794). Three more children were born of that marriage -- James (Petitioner), Mark, and Sylvia.

Petitioner's statements to mental health providers provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. (Transcript, at 629-634; Petitioner's Collective Exhibit 150; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9). Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. (Transcript, at 475, 631, 818; Petitioner's Collective Exhibit 150). Petitioner's father struck Petitioner's penis with a baseball bat. (Transcript, at 475, 632). To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. (Transcript, at 634). None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury. This was a grave omission by defense counsel.

This, of course, is not to suggest that people who are abused as children should get away with murder. People with bad childhoods can be sentenced to death. But, the Constitution requires that these significant facts should have been presented to the jury at sentencing by counsel.

Petitioner's school and mental health records indicate that Petitioner's family lived in several different locations, and that Petitioner had undergone mental evaluations several times during his childhood. Petitioner ran away from home several times, and eventually, at 15, left home for good. (Mark Jones Affidavit at ¶ 4, Petitioner's Collective Exhibit 74; Transcript, at 630).

A reasonable investigation would have produced information about Petitioner's mental history. A review of the MTMHI records, which trial counsel had in their possession before trial, would have indicated that Petitioner had had prior mental evaluations, that he had served in the army, and had spent several years in prison. (Petitioner's Collective Exhibit 150). Petitioner's school, military and prison records reveal that Petitioner had been diagnosed in 1964 as having "paranoid personality" (December 11, 1964 -- Western State Hospital, Tacoma, Washington, Respondent's Collective Exhibit 8) and, in 1971, as having a "passive aggressive personality, aggressive type." (May 11, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142). These records also describe the Petitioner as: "very sick" and in need of immediate commitment (November 12, 1964 -- Richard Stiles of Dupont Junior High School, Respondent's Collective Exhibit 8), "in serious need of therapy" (May 24, 1965 -- Sayre Junior High School Staff, Respondent's Collective Exhibit 7); and "highly disturbed." (December 30, 1970 -- FR, Petersburg, Petitioner's Collective Exhibit 142; Respondent's Collective Exhibit 6, Tab 8). The records also reflect numerous suicide attempts (February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9; April 15, 1969 -- Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; March 19, 1971 -- FR, Petersburg, Petitioner's Collective Exhibit 142; June, 1972 -- FCI, Tallahassee, Addendum 11, PC Exhibit). None of this evidence was offered to the jury. This was significant error by counsel.

Petitioner also had a family history of serious mental conditions. Petitioner's sister, Sylvia, attempted suicide on multiple occasions and was institutionalized several times for mental health problems. (Transcript at 803, 815, 626). Petitioner's brother, Mark, committed

suicide while this case was pending in this Court.[33] To call the Jones family dysfunctional would be an understatement. (Transcript at 626).

Had counsel conducted an in-depth interview before calling Susi Bynum to testify at sentencing, they would have gathered more evidence regarding Petitioner's mental health. They would have learned about Petitioner's belief that he and his wife would have the next Messiah; Petitioner's having carried on conversations with nonexistent people and animals; and his having banged his head against the wall on various occasions. (Transcript, at 1224, 1225, 1229, 1216).[34] Again, none of this evidence was made known to the jury. Ms. Bynum testified that she even told Mr. Barrett that he should have a psychiatrist examine the Petitioner before the trial. (Transcript, at 1250). These were serious deficiencies by defense counsel.

Had trial counsel heeded Ms. Bynum's suggestion and hired a mental health professional to evaluate the Petitioner, or had they interviewed MTMHI's Dr. Craddock, they could have presented evidence that Petitioner had, at the very least, exhibited symptoms of a Borderline Personality Disorder, including extreme emotional swings, identity disturbance, and self-mutilating behavior. (Transcript, at 129-132; 140). A mental health professional, like Dr. McCoy, could have offered testimony about Petitioner's background and mental history, and could have offered an explanation placing in context the negative aspects of Petitioner's past.

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[33] Sylvia Jones, as a teenager, had a child out of wedlock by her own father according to Ms. Lancaster's uncorroborated view of the family's history. (Transcript at 793-795). The whereabouts of Sylvia Jones is unknown. Mark Jones committed suicide on July 13, 1996. (Transcript at 793). The suicide was within days of his arrest for sexually and physically abusing his children. (Transcript at 627).

[34] The Court notes that the MTMHI files also revealed much of this same information. (Petitioner's Collective Exhibit 150).

(Transcript, at 613-663). By describing Petitioner's history of earnestly seeking a religious faith with which to align himself, Dr. McCoy's testimony would have supported the notion that Petitioner had been strongly influenced by the SEGM. None of this was put into evidence before the jury. The failure of counsel to do so was a serious error.

Trial counsel could have presented testimony showing that, despite his mental health problems, Petitioner had functioned as a productive member of society during the year before he came to Tennessee. If they had heeded Petitioner's suggestion that they talk with Sarah Roberts Walton, Petitioner's former fiancé, they could have learned that after Petitioner was released from prison in Chicago, in 1983, he was hard-working and giving. Ms. Walton, now an attorney for the State of Maine,[35] testified that when she knew the Petitioner in 1983, he held a steady job, attended college, and performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence. (Transcript, at 1181, 1195-1196, 1197, 1205; Bretzlauf deposition, at 14-15, 17).[36] Ms. Walton described the Petitioner as gentle, caring, and filled with dignity; a person with whom she shared a sincere Christian belief. (Transcript, at 1204-1205). The jury heard nothing of the sort from any witness. This was a very significant failure by defense counsel.

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[35] Ms. Walton has represented the State of Maine on two murder appeals. (Transcript at 1182).

[36] Ms. Walton ultimately broke off the engagement because she was concerned that Petitioner had psychological problems. (Transcript, at 1189-1190). Petitioner subsequently moved to Tennessee the year before the stabbings to be close to his brother, Mark Jones, who was stationed at Fort Campbell. (Transcript, at 1195).

The Court finds the testimony of Ms. Walton to be extremely credible. The content of her testimony, as well as her demeanor, made her a compelling mitigation witness on behalf of Petitioner for purposes of sentencing. Ms. Walton's testimony, based on personal knowledge, added a humanizing dimension to the life history and character of the Petitioner, good and bad, that was absent from any prior proceeding in state court, and yet could have been presented to the jury, had trial counsel conducted a reasonable investigation.

Had defense counsel learned more about the 1972 murder conviction, they could have presented evidence to the jury that the killing occurred when Petitioner approached the victim, Michael Stein, in his cell to confront him about spreading rumors that Petitioner had engaged in homosexual conduct, and that Petitioner stabbed Stein during that confrontation. (Bishop Deposition, at 22-23, 24-25, 26, Petitioner's Exhibit 135; Delagrange Deposition, at 18-19, Petitioner's Exhibit 136; Petitioner's statement dated April 2, 1972, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Letter dated April 15, 1987 from David G. Lowe to John Zimmerman, attached as Exhibit to Delagrange Deposition, Petitioner's Exhibit 136; Memo dated April 7, 1972 from H.R. Hogan to Norman A. Carlson, attached as Exhibit to

Delagrange Deposition, Petitioner's Exhibit 136).[37] The prison murder was not about drugs and gangs as represented by the prosecution to defense counsel.

More importantly, Dr. Masri testified at the 1972 murder trial that Petitioner had a "homosexual panic" and lost control when he killed Stein. (Petitioner's Exhibit 131, at 48). As noted above, Dr. Masri also diagnosed the Petitioner as having a Borderline Personality Disorder and Schizoid Personality. (Petitioner's Exhibit 131, at 53). Although this information does not provide a justification for the murder, it does provide the jury with some information upon which to evaluate it. Without some information tending to mitigate this prior murder, there was nothing to alter the likely mindset of the jury that because Petitioner had killed someone before, he was not deserving of any leniency. The jury heard none of this evidence. Again, defense counsel made a substantial mistake.

Instead, at the sentencing hearing, the jury heard only two witnesses for the defense, the Petitioner and his wife. The defense was breathtakingly brief in content, and lacking in quality, and quantity. (Addendum 1, at 1836-1930). Petitioner's testimony on direct was essentially limited to his relationship with SEGM, his account of the events surrounding the stabbings, and a plea for his life. (Addendum 1, at 1836-1870). During cross-examination, the Petitioner initially

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[37] In response to a claim made by Mrs. Stein after her son's death, representatives of the federal institution where he had been incarcerated took the position that:

> Mr. Stein was a member of a group of inmates who were attempting to apply extortionate pressures on Jones to submit to Stein's demands for homosexual activities. The assault itself on April 1 arose out of an attempted assault on Jones approximately two weeks earlier by members of this group.

(Petitioner's Collective Exhibit 142; Bishop Deposition, at 25, Exhibit 135).

lost his composure, and was not particularly articulate in answering the prosecutor's questions. (Addendum 1, at 1870-1905). Mr. Camp described the Petitioner's performance as "one of the saddest things I have seen in my legal career." (Transcript, at 731).[38]

The only line of questioning put to Petitioner's wife, Susi Bynum Jones, related to whether she had written some bad checks before Petitioner was incarcerated. (Addendum 1, at 1919-1929).[39] Counsel did not even attempt to elicit testimony from Mrs. Jones that she loved her husband, found good in him, or hoped he would not be executed.[40]

The jury in this case heard no witnesses who expressed a concern whether Petitioner lived or died, even though such witnesses were available and known to defense counsel. This was a grievous flaw.

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[38] Mr. Camp described trial counsels' deficiencies regarding Petitioner's testimony:

> It is my opinion that Mr. Jones was not prepared to go on the stand, that because of what I perceived to be his mental health problems that it would be hard for him to have been successful on the stand because we had not provided the factual foundation that the jury needed to be able to hear this man in context, that all they got was literally this man begging for his life.
>
> And it was more than he could handle and that he just broke down.

(Transcript, at 731).

[39] Even though he conducted the direct examination of the Petitioner's wife, the only mitigation witness offered besides the Petitioner, Mr. Camp did not conduct an interview with her prior to trial. (Transcript, at 724; 1248, 1250).

[40] Ms. Jones spoke effervescently about her husband at the hearing in this case. "Well, when I first met James, he opened up his mouth, it was like thunder from heaven ... I was fascinated with James ... he was different, just different from any man I had ever met ... he wanted to do something for the world. I was intrigued by that." (Transcript, at 1216).

As Respondent argues, and the state courts found, there was also a considerable amount of negative evidence that the prosecution could have introduced during the sentencing hearing. That evidence includes a criminal record which indicates that Petitioner was convicted of assault at the age of 15, and two more assaults at the age of 19. (Petitioner's Exhibit 105; Petitioner's Exhibit 146; Respondent's Collective Exhibit 9; Respondent's Collective Exhibit 10). As noted above, Petitioner was convicted of the second degree murder of Michael Stein at the age of 21. (Petitioner's Exhibit 105).

Petitioner has been diagnosed as having a sociopathic personality disturbance with anti-social reaction and mild depression, (March 10, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9), as having an anti-social personality (November 7, 1968 -- Fort Meade, Maryland, Respondent's Collective Exhibit 10; June, 1977 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 59), and as having a psychopathic personality. (January 13, 1978 -- USP Leavenworth, Kansas, Respondent's Collective Exhibit 6, Tab 67).

Petitioner has also been diagnosed as having no mental illness. (April 15, 1969 -- Baltimore City Jail, Respondent's Collective Exhibit 6, Tab 2; December 31, 1969 -- St. Elizabeth's Hospital, Respondent's Collective Exhibit 11; April, 1970 -- Dr. Angus, Respondent's Collective Exhibit 6, Tab 101; Dr. Eardley testimony at Stein murder trial, Petitioner's Exhibit 131, at 57-58, 59, 66).

The prosecution could have introduced evidence that during his many years in prison, Petitioner was involved in numerous citations for misconduct, including possession of a knife. (Respondent's Collective Exhibit 6). Prison records would also show that Petitioner escaped

shortly before his parole date in 1982, but was recaptured a few months later. (Respondent's Collective Exhibit 6, Tab 94). While on escape, Petitioner was a witness in a murder case.

Petitioner's army records indicate that during his service in the army, Petitioner was absent without leave on more than one occasion, and ultimately, was discharged under conditions other than honorable. (Respondent's Collective Exhibit 10).

Finally, Petitioner's school records indicate that he was suspended from school for threatening a teacher with a knife. (May 24, 1965 -- Sayre Junior High School, April 25, 1966 -- Shaw Junior High School, Respondent's Collective Exhibit 7; February 9, 1967 -- New Jersey State Hospital, Respondent's Collective Exhibit 9).

Notwithstanding this negative evidence, however, the Court is persuaded that had counsel presented the other evidence of Petitioner's background and mental history, there is more than a reasonable probability that at least one juror would have voted for a life sentence rather than the death penalty. It only takes one juror to decide that the mitigation evidence presented by the Petitioner outweighs the aggravating circumstances established by the prosecution. (Tenn. Code Ann. § 39-2-203; Exhibit 155). No mitigation evidence was presented during Petitioner's sentencing, and therefore, it is not surprising that the jury struck the balance in favor of the death penalty.

This is not a case where counsel collected and put on the significant mitigating evidence and merely failed to get everything. This is a case of no mitigating evidence -- none -- being offered to the jury despite its availability and abundance. Defense counsel was substantially ineffective and Petitioner was thereby deprived of a constitutionally fair trial.

Petitioner stated it succinctly to the jury at sentencing:

> I don't know you. You don't know me. So, it ain't no feeling there what you should do to me.

(Addendum I, at 1869, lines 15-16).

According to the prosecutor's assessment after trial, given the paucity of evidence that was presented by Petitioner's attorneys, the jury had little reason to hesitate in imposing the death penalty: "The jurors all expressed to us their satisfaction with their verdict and were quite surprised at their own ability to impose the death penalty on this particular man with no reluctance whatsoever." (Letter dated July 17, 1987 from John Zimmerman to David G. Lowe; Petitioner's Collective Exhibit 136).

The Court acknowledges that Lionel Barrett and Sumter Camp have good reputations in the Nashville bar for being fine criminal defense lawyers. This case illustrates that lawyers do not make cases based on their reputations. A lawyer must actually work on each case. Cases are made through factual investigation, research, writing, witness preparation, trial strategy, and a bit of good fortune. In this case, the hard work required was simply not done. This Court agrees with the state post-conviction trial and appellate courts that Mr. Barrett and Mr. Camp provided inadequate representation. Good lawyers can and do fail. Here, Mr. Barrett and Mr. Camp utterly failed in their duty to adequately represent their client, who, as a result of this miscarriage of justice, was unconstitutionally sentenced to death.[41] This is not a case of harmless error.

This conclusion is not one the Court reaches casually. The Court is mindful of the importance of the sovereignty of the State of Tennessee and the need to respect the certainty and

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[41] Mr. Barrett as lead counsel, and Mr. Camp as assistant counsel, each had an independent duty to provide effective assistance of counsel.

finality of court judgments. This Court has no interest in simply second-guessing the decisions of the state courts. But the overwhelming nature of the evidence presented to this Court, a significant portion of which was not presented to the jury or the state courts,[42] and the almost complete failure to present a defense at Petitioner's sentencing hearing, compels the Court's conclusion that Petitioner's death sentence cannot stand. The Constitution of the United States, and this Court's duty to uphold its principles, mandate the issuance of the writ of habeas corpus as to Petitioner's death sentence.

IX. Conclusion

All Petitioner's claims are procedurally defaulted except Petitioner's Brady claims, trial counsel conflict of interest claim, the ineffective assistance of counsel claim, and those claims already addressed by the Court in previous orders. The Court concludes that Petitioner's Brady claims, and conflict of interest claims, are without merit, and they are dismissed.

With respect to Petitioner's ineffective assistance of counsel claim, the Court concludes that Petitioner received ineffective assistance of counsel during the sentencing phase of his trial, and therefore, Petitioner's petition for a writ of habeas corpus relief is granted as to that claim. Accordingly, the Court vacates Petitioner's sentence of death, and remands this case to the State of Tennessee for further proceedings not inconsistent with this opinion. As noted above, Petitioner is also serving two consecutive life terms for assault with intent to commit murder and armed robbery and shall remain incarcerated.

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[42] For example, Nancy Lancaster, Sarah Roberts Walton, Robert Sadoff, Diana McCoy, Kris Sperry, Raymond Winbush and Brian Stephenson were not called as witnesses in the state post-conviction proceeding.

It is so ORDERED.

Todd Campbell

TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

FILED

SEP 13 2000

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 98-6568; 98-6569

ABU-ALI ABDUR'RAHMAN,
Petitioner - Appellee/Cross-Appellant,

v.

RICKY BELL, Warden,
Respondent - Appellant/Cross-Appellee.

Before: SILER, BATCHELDER, and COLE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's finding of prejudice at the sentencing stage is REVERSED; the district court's judgment granting the petition for a writ of habeas corpus as to petitioner Abu-Ali Abdur'Rahman's death sentence is VACATED; the district court's judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

APPENDIX

ABU-ALI ABDUR'RAHMAN,
Petitioner-Appellee/Cross-Appellant,

v.

RICKY BELL, Warden,
Respondent-Appellant/Cross-Appellee.

Case Nos. 98-6568/6569

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville
No. 96-00380--Todd J. Campbell, District Judge.

Argued: January 31, 2000
Decided and Filed: September 13, 2000

Before: SILER, BATCHELDER, and COLE, Circuit Judges.

COUNSEL

ARGUED: Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, for Appellee. **ON BRIEF:** Gordon W. Smith, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL JUSTICE DIVISION, Nashville, Tennessee, for Appellant. Bradley A. MacLean, FARRIS, WARFIELD & KANADAY, Nashville, Tennessee, William P. Redick, Jr., Whites Creek, Tennessee, Brian K. Frazier, NEAL & HARWELL, Nashville, Tennessee, for Appellee.

SILER, J., delivered the opinion of the court. BATCHELDER, J. (pp. 34-41), delivered a separate concurring opinion. COLE, J. (pp. 42-50), delivered a separate opinion concurring in part and dissenting in part.

OPINION

SILER, Circuit Judge. Respondent, Ricky Bell, Warden ("State"), appeals the issuance of a writ of habeas corpus to Petitioner, Abu-Ali Abdur'Rahman ("Petitioner"),[1] vacating Petitioner's sentence of death for first-degree murder on the grounds of ineffective assistance of counsel at the sentencing phase of Petitioner's trial. Additionally, Petitioner cross-appeals the denial of his petition for a writ of habeas corpus seeking relief from his conviction for first-degree murder. We reverse the district court's finding that Petitioner was prejudiced by his trial counsel's deficient performance at the sentencing stage and vacate the portion of the district court's judgment granting the petition for a writ of habeas corpus as to the death sentence. Additionally, we affirm the portion of the district court's judgment denying the petition for a writ of habeas corpus as to the conviction.

I. BACKGROUND

Petitioner was tried and convicted of first-degree murder, assault with intent to commit murder, and armed robbery. He received the death penalty for the murder conviction and two consecutive life terms for the each of the other convictions. The death sentence was imposed pursuant to the jury's finding of three aggravating circumstances: (1) the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; (2) the murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; and (3) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first-degree murder, arson, rape, robbery, burglary, theft, or kidnapping. Petitioner's convictions arose out of an offense that occurred in 1986.

On February 16, 1986, Petitioner purchased a small amount of marijuana from Patrick Daniels at the duplex in which Daniels lived in Nashville, Tennessee. Petitioner and Harold Devalle Miller later agreed to rob Daniels. The plan

[1]Petitioner was originally named James Lee Jones, but he changed his name to Abu-Ali Abdur'Rahman.

was for Petitioner to enter the duplex under the pretext of making a drug purchase, at which point Miller would force his way into the duplex and "rob" both Daniels and Petitioner with a shotgun that Petitioner had supplied. This plan was never executed, however, as Miller became too frightened to go through with it. Petitioner then formulated a second plan to rob Daniels, this time using a knife to avoid making too much noise.

On February 17, 1986, Petitioner, armed with a shotgun, and Miller, armed with an unloaded pistol, entered the duplex under the pretext of making a drug purchase. Petitioner and Miller displayed their firearms and forced Daniels and his girlfriend, Norma Norman, to the floor. Petitioner then bound Daniels and Norman with duct tape about their hands, feet, eyes, and mouth. After stealing Daniels's bank card, Petitioner forced Daniels to reveal his PIN number. Petitioner also searched the house and found some marijuana in some sofa cushions.

Petitioner then told Daniels that he had been sent from Chicago to "clean up everything" and that he was there to teach Daniels a lesson. Petitioner obtained a butcher knife from the kitchen and stabbed Daniels six times in the chest, penetrating his heart four times. Prior to and during the stabbing, Daniels was crying and begging Petitioner not to hurt anyone. After Daniels became motionless, Petitioner stabbed Norman in the back several times, but Miller pulled Petitioner away and the two men fled, leaving the knife in Norman's back. Daniels died as the result of his wounds, but Norman survived. Petitioner and Miller also took $300 from a box in Norman's bedroom.

At trial, Petitioner argued that the real motivation for the crime was born out of the influence of his membership in a "quasi-religious paramilitary group" called the Southeastern Gospel Ministry ("SEGM"). Petitioner had a long criminal history, including a conviction for second-degree murder in 1972 and a conviction for assault with a dangerous weapon (a knife) in 1970. Following his incarceration for these offenses, he moved to a halfway house in Nashville. While living at the halfway house he worked for an organization called the Baptist Publishing Board, and eventually met Allen

Boyd, one of the Board's owners, and Boyd's associate, William Beard. Boyd and Beard were the leaders of the SEGM; Miller was also a member of the SEGM. One of the alleged goals of the SEGM was to cleanse the black community of drug dealers and other undesirable elements. Boyd allegedly furnished the shotgun used during the offense and assisted Petitioner and Miller after the offense, including giving Miller some money to flee.

Petitioner was initially represented by Neal McAlpin, who was asked by Boyd to take on the representation. Boyd allegedly indicated to McAlpin that he would be paying Petitioner's attorney's fees. However, McAlpin subsequently determined that Boyd was a member of the SEGM. With Boyd being the source of his fees, as well as perhaps being involved in the crime, McAlpin felt that a conflict of interest existed within the third-party fee arrangement and that he could not continue the representation. Gail Hughes, an associate of Boyd's, then requested that Lionel Barrett represent Petitioner. Barrett agreed to do so for a retainer fee of $15,000, $5,000 of which was paid to him fairly soon, though he never inquired as to the source of the funds. Barrett and another attorney, Sumter Camp, represented Petitioner at trial.

Petitioner alleges that this representation was ineffective throughout the trial, including both the guilt phase and the sentencing phase. Barrett testified that at the time he received the first $5,000 of the retainer he decided he was not going to perform any work on the case until he received the balance of the retainer fee, a balance that was never paid. Petitioner also claims that Barrett performed no work on the case until he filed pre-trial motions. Petitioner alleges that Barrett's performance as counsel was ineffective due to failure to: (1) investigate; (2) present potentially exculpatory evidence; and (3) present mitigating evidence at the sentencing stage.

His conviction and sentence were affirmed by the Tennessee Supreme Court in *State v. Jones*, 789 S.W.2d 545 (Tenn.), *cert. denied*, 498 U.S. 908 (1990). He sought post-conviction relief in the state trial court which conducted a hearing, made findings, and denied relief. The judgment was affirmed in *Jones v. State*, No. 01C01-9402-CR-00079, 1995

WL 75427 (Tenn. Crim. App. Feb. 23, 1995), and the Tennessee Supreme Court denied review. The United States Supreme Court denied a petition for a writ of certiorari in *Jones v. Tennessee*, 516 U.S. 1122 (1996). Petitioner later filed this petition for a writ of habeas corpus, challenging both his conviction and sentence. After Petitioner's motion for partial summary judgment was denied, the district court held an evidentiary hearing to address the merits of his habeas petition. The district court granted the writ on Petitioner's claim of ineffective assistance of counsel at the sentencing stage due to counsel's failure to present mitigating evidence despite its availability. However, the district court denied Petitioner's claim of ineffective assistance of counsel at the guilt stage, holding that although the performance of Barrett and Camp was deficient, Petitioner suffered no prejudice thereby. *Abdur'Rahman v. Bell*, 999 F.Supp. 1073 (M.D. Tenn. 1998). This is an appeal from that decision.

II. DISCUSSION

A. State's Appeal Challenging the Judgment Granting the Petition for a Writ of Habeas Corpus as to the Death Sentence

1. Presumption of Correctness Under 28 U.S.C. § 2254

The State argues that the district court improperly dispensed with the presumption of correctness that is to be accorded to state court findings of fact under 28 U.S.C. § 2254(d)[2] without providing a statement of its reasons for

[2] 28 U.S.C. § 2254(d) (repealed), in effect when the instant petition was filed, states:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
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> (1) that the merits of the factual dispute were not resolved in the State court hearing;

doing so as required by *Sumner v. Mata*, 449 U.S. 539 (1981), and *Mitchell v. Rees*, 114 F.3d 571 (6th Cir. 1997). Petitioner responds that claims of ineffective assistance of counsel involve mixed questions of law and fact that are not accorded the presumption of correctness under *Strickland v. Washington*, 466 U.S. 668 (1984).

The post-conviction trial court held that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental history, making the following factual findings in the process:

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(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

1. Testimony and files of trial counsel showed that few witnesses were investigated or interviewed regarding petitioner's background and mental health history.
2. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's prior psychological consultation at ages 12 to 14 while at Ft. Shafter, Hawaii.
3. Testimony and files of trial counsel showed that they failed to investigate and obtain readily available information concerning petitioner's psychological assessment at age 14 by the school psychologist at Dupont Jr. High School at Ft. Lewis, Washington.
4. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's juvenile incarceration for being a psychopathic delinquent at Western State Hospital in Tacoma, Washington.
5. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning the petitioner's school records in Philadelphia, where on May 24, 1965 there was a request for psychological service by Sayre High School.
6. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's school records in Philadelphia, where on June 17 he was referred for Special Education.
7. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's incarceration at the Annadale Institute for Boys, New Jersey, when he was 15, his being placed on psychiatric watch in January of 1967 and his referral to and psychological examination at the New Jersey State [Psychiatric] hospital at Trenton in February of 1967.
8. Testimony and files of trial counsel showed that they failed to investigate and obtain available

information concerning petitioner's Army records at ages 17 and 18 with notations regarding his "questionable mental status," bizarre behavior, and psychiatric reports leading ultimately to discharge.

9. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination at St. Elizabeth's Hospital, Washington, D.C., following his incarceration for assault on or about the day of his discharge from the Army, despite the fact that part of this information was sent to MTMHI [Middle Tennessee Mental Health Institute] per their request.

10. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's institutional records while in the federal prison system.

11. Testimony and files of trial counsel showed that they failed to investigate and obtain available information concerning petitioner's psychiatric examination following petitioner's 1972 killing of a fellow prisoner while incarcerated for the assault referenced in paragraph 9 above.

12. Trial counsel has little knowledge of the facts related to the petitioner's 1972 murder conviction.

13. They failed to interview the psychiatrist and psychologist who conducted the MTMHI evaluation until after the trial began.

Abdur'Rahman, 999 F.Supp. at 1093. The district court referred to these findings in its opinion partially granting habeas relief, but did not address the presumption of correctness that arguably applied to them under 28 U.S.C. § 2254. Instead, citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984), and *Queen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996), it merely noted that "[t]he ultimate question of whether Petitioner received effective assistance of counsel is a mixed question of law and fact, which is reviewed de novo." *Abdur'Rahman*, 999 F.Supp. at 1092.

This was an accurate statement of the law by the district court, though not a complete one. A close reading of the

relevant portion of *Strickland* indicates that while the ultimate question of ineffective assistance of counsel is a mixed question of law and fact, the factual findings of state courts underlying such an analysis are accorded the presumption of correctness:

> **Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d),** and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and the prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Strickland, 466 U.S. at 698 (emphasis added). Thus, the state post-conviction trial court's findings of fact underlying its ineffectiveness inquiry should have been presumed correct.

This presumption is not mandatory because a district court may preclude its application upon the finding of any one of the listed exceptions in 28 U.S.C. § 2254(d). However, in order to do so "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'" *Sumner*, 449 U.S. at 551. In the recent opinion in *Mitchell v. Rees*, this court discussed this requirement.

> We begin with the application of 28 U.S.C. § 2254(d), which establishes a presumption of correctness for factual determinations made by the state courts whose judgments are challenged by the federal habeas petitioner. The Supreme Court, in *Sumner v. Mata*, held that § 2254(d) mandated that the presumption of correctness be applied by the habeas court to a finding of the state appellate court that "'the facts of the present case' did not adequately support respondent's claim." The Court went on to lay down the rule that "a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that

the state finding was 'not fairly supported by the record.'" The reason for this requirement, the Court explained, is that "[n]o court reviewing the grant of an application for habeas corpus should be left to guess as to the habeas court's reasons for granting relief notwithstanding the provisions of § 2254(d)." And in a footnote, the Court further explained that "the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise of [federal court] jurisdiction. As we held in *Louisville & Nashville R. Co. v. Mottley*, and have repeatedly since reaffirmed, 'it is the duty of this [C]ourt to see to it that the jurisdiction of the [district court] which is defined and limited by statute, is not exceeded.'"

. . . It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"

Mitchell, 114 F.3d at 575-77 (citations omitted). Thus, the district court committed the same error by apparently dispensing with the presumption of correctness without a statement of its reasons for granting relief notwithstanding the provisions of § 2254(d).

Relying solely upon the erroneous argument that the presumption of correctness does not apply to the post-conviction trial court's findings of fact, Petitioner fails to argue that any one of the listed exceptions in § 2254(d) applies and requires that the court dispense with the presumption of correctness. However, he argues that § 2254(d)(8) would entitle him to an evidentiary hearing, pointing to evidence in the record allegedly showing that he did not receive a full and fair hearing in state court at trial, during post-conviction proceedings, and on appeal. The State argues that due to Petitioner's formal presence before the state trial and appellate courts, his ability to call witnesses and otherwise present evidence, and his pursuit of his claims on

appeal, he cannot be heard to claim that he did not receive a full and fair hearing. This position is correct. *See Andrews v. Collins*, 21 F.3d 612, 619 (5th Cir. 1994) (noting that the opportunity to present evidence, to present witnesses, and to fully cross-examine prosecution witnesses supports the finding of a full and fair hearing); *see also Sumner*, 449 U.S. at 546 (stating that "[s]ince that court [state appellate court] was requested to determine the issue by respondent [the convicted murderer], we do not think he may now be heard to assert that its proceeding was not a 'hearing' within the meaning of § 2254(d)."). Thus, because Petitioner received a full and fair hearing the presumption of correctness applies.

It is clear that the court erred in not addressing the presumption of correctness as required by *Sumner*, *Strickland*, and *Mitchell*. However, it is unclear as to whether the district court held that the presumption of correctness did not apply. This ambiguity arises because the district court ordered an evidentiary hearing and received evidence that was not presented in any of the state court proceedings. Additionally, it considered the new evidence in its opinion partially granting habeas relief to Petitioner, yet failed to explicitly find whether the new evidence contradicted and possibly rebutted the presumption of correctness, or merely supplemented the post-conviction trial court's findings of fact.

Presumably, however, because the court simply exercised de novo review under its mistaken interpretation of *Strickland* it did dispense with the presumption of correctness. Thus, the district court erred by failing to recognize that the presumption of correctness applied to the post-conviction trial court's findings of fact and erred by failing to include in its opinion the reasoning why the presumption of correctness did not apply. Unlike *Mitchell*, however, this error does not require a remand because we hold that the district court properly ordered an evidentiary hearing and properly considered the evidence it heard.

2. Inherent Discretion to Order an Evidentiary Hearing

Applying the presumption of correctness under § 2254(d) is an entirely separate and distinct issue from whether a district court may or is required to order an evidentiary hearing to settle allegedly disputed issues of material fact. However, as a practical matter, when a district court finds that the presumption of correctness does not apply due to one of the listed exceptions in § 2254(d), a hearing is probably warranted. As discussed below, this is an issue that is independent of whether a habeas Petitioner is *entitled* to an evidentiary hearing. This latter issue is not raised by the instant appeal, because the district court properly ordered an evidentiary hearing pursuant to its inherent discretionary authority.

The district court ordered an evidentiary hearing "to resolve the numerous complex factual and legal issues presented." The State argues that the district court abused its discretion in ordering an evidentiary hearing because *Mitchell* does not allow for such a hearing in the absence of a finding of one of the § 2254(d) factors. Alternatively, it argues that Petitioner is not entitled to an evidentiary hearing due to his failure to show either cause and prejudice for the failure to develop the facts in the state proceedings or that a fundamental miscarriage of justice would result from the district court's failure to hold an evidentiary hearing. Petitioner responds by attempting to distinguish *Mitchell* and by arguing that a district court has inherent authority to order an evidentiary hearing to settle claims of ineffective assistance of counsel.

As the above-quoted portion of *Mitchell* shows, this court has held that a district court does not have the authority to order an evidentiary hearing when it fails to properly dispense with the presumption of correctness. Additionally, this court succinctly discussed the cause and prejudice requirements that the State argues are relevant to this appeal:

> Because § 2254(d) is an express limitation on the district court's jurisdiction, a district court is without authority to hold an evidentiary hearing on a matter on which the state court has made findings unless one of

> the factors contained in § 2254(d) applies. It was error, therefore, for the district court to dispense with the presumption of correctness embodied in § 2254(d) and to order an evidentiary hearing without providing a written statement of the "reasoning which led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was 'not fairly supported by the record.'"
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> Once a district court has properly determined that it may dispense with the presumption of correctness mandated by § 2254(d), the court has some discretion in determining whether to hold an evidentiary hearing. However, an [sic] habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Therefore, a district court abuses its discretion by ordering such a hearing without first requiring the petitioner to make the requisite showing.

Mitchell, 114 F.3d at 577 (citations omitted). Thus, strictly on the basis of *Mitchell*, because the district court did not find that one of the factors contained in § 2254(d) supplies, the court lacked the authority to order an evidentiary hearing.[3]

Petitioner argues that *Mitchell* is inconsistent with both Supreme Court authority and other authority emanating from this Circuit which recognizes that district courts always have

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[3] Petitioner attempts to distinguish *Mitchell* by arguing that the *Batson v. Kentucky*, 476 U.S. 79 (1986), challenge involved therein was based solely upon factual state court findings, whereas the instant case involves an ineffectiveness of counsel claim that was clearly a mixed finding of fact and law. In turn, Petitioner argues that because the presumption of correctness does not apply in the instant case, *Mitchell* is not applicable and therefore not controlling. However, as the above-stated conclusion shows, the presumption of correctness does apply to the post-conviction trial court's findings of fact. Thus, Petitioner's attempt to distinguish *Mitchell* is erroneous.

the inherent authority to order evidentiary hearings to settle disputed issues of material fact. Petitioner cites and quotes to *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), for the proposition that "the power of inquiry on federal habeas review is plenary." *Id.* at 312. Although *Townsend* was partially overruled as discussed below, the Court set out six situations in which a district court on habeas review must hold an evidentiary hearing. *Id.* at 313-14. Additionally, the Court stated that:

> [t]he purpose of the test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found in the hearing. But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.

Id. at 318. Thus, it seems that despite the holding in *Mitchell*, a district court does have the inherent authority to order an evidentiary hearing even if the factors requiring an evidentiary hearing are absent.

This issue was further discussed in *Keeney*, which partially overruled *Townsend* by holding that the cause and prejudice test applies to a habeas petitioner's failure to develop material facts at the state court level. *See Keeney*, 504 U.S. at 5. In so holding, the Court discussed in a footnote the relation between the instances listed in *Townsend* in which a district court must hold an evidentiary hearing and the exceptions to the presumption of correctness listed in § 2254(d):

> First, it is evident that § 2254(d) does not codify *Townsend's* specifications of when a hearing is required. *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it

> lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. The two issues are distinct, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.

Id. at 10 n.5. Thus, this passage indicates the continuing viability of *Townsend's* statement that a district court may order an evidentiary hearing to settle disputed issues of material fact even following the adoption of the exceptions to the presumption of correctness listed in § 2254(d).

Thus, *Mitchell's* statement that a district court is without authority to order an evidentiary hearing in the absence of one of the exceptions listed in § 2254(d) is overbroad in that it fails to recognize the inherent authority that a district court always has in habeas cases to order evidentiary hearings to settle disputed issues of material fact. This court has previously recognized this principle. *See Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992) (quoting *Townsend* for the proposition that a district judge's power to receive evidence on a habeas petitioner's constitutional claim is only constrained by his sound discretion). Other Circuits have likewise recognized this inherent discretion. *See Seidel v. Merkle*, 146 F.3d 750, 754-55 (9th Cir. 1998); *Clemmons v. Delo*, 124 F.3d 944, 952 (8th Cir. 1997); *Pagan v. Keane*, 984 F.2d 61, 63-65 (2d Cir. 1993).

Of course, recognizing a district court's inherent discretion to order an evidentiary hearing is an issue that is separate and distinct from whether a habeas petitioner is *entitled* to an evidentiary hearing. As Petitioner correctly points out, *Keeney* and *Mitchell* stand for the proposition that a:

> habeas petitioner who has not developed the record in state court is entitled to an evidentiary hearing only if he shows (1) "cause for his failure to develop the facts in state-court proceedings and actual prejudice resulting from that failure" or (2) "that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."

Mitchell, 114 F.3d at 577 (quoting *Keeney*, 504 U.S. at 11-12). Because the district court properly ordered an evidentiary hearing pursuant to its inherent authority to do so, the issue of whether Petitioner is entitled to an evidentiary hearing is irrelevant and will not be addressed.

Following the oral arguments in this case, the Supreme Court decided *Williams v. Taylor*, 120 S.Ct. 1479 (2000), in which it interpreted the fault requirement of a provision of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 ("AEDPA"). The specific provision that was at issue states that "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows [the existence of two limited exceptions]." 28 U.S.C. § 2254(e)(2). While the use of the word "shall" in this provision may evidence the Congressional intent to remove a district court's inherent discretion to order an evidentiary hearing in the absence of either of the provided exceptions, this provision does not apply to the instant appeal because Petitioner filed his habeas petition on the day before the enactment of AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 326-27 (1997) (holding that AEDPA only applies to petitions filed after the date of its enactment). While there may not be any inherent discretion to order an evidentiary hearing following the enactment of AEDPA, we decline to specifically determine whether AEDPA has so altered the law. *Williams* does not, therefore, lead to the conclusion that the district court erred below.

Additionally, although *Williams* characterized the *Keeney* decision as "requir[ing] the prisoner to demonstrate cause and prejudice excusing the default before he could receive a hearing on his claim," *id.* at 1488, the use of the word "could" does not imply that if the district court ordered a hearing based upon its inherent discretion, it erred. Thus, the distinction between when a petitioner is entitled to a hearing, which was at issue in *Keeney*, versus whether a district court has the inherent discretion to order a hearing, is still intact following *Williams*.

3. Ineffective Assistance of Counsel

Recognizing that in a habeas case a district court has the inherent authority to order an evidentiary hearing to settle disputed issues of material fact obviously raises the issue of how any evidence received by the district court is to be considered if the court holds that the presumption of correctness under § 2254(d) applies. The post-conviction trial court concluded that Petitioner's trial counsel's performance was deficient during the sentencing phase due to the failure to investigate and obtain information about Petitioner's background and mental health. However, it went on to hold that Petitioner suffered no prejudice at the sentencing stage because the evidence that he would have offered to support a finding of mitigating circumstances was both helpful and harmful and that it would not have been a prudent strategy to present the evidence. The Tennessee Court of Criminal Appeals affirmed that decision. *See Jones*, 1995 WL 75427, at *2. The State argues that in the absence of the evidence presented at the evidentiary hearing below, the state court findings of fact show deficient performance on the part of Petitioner's trial counsel, but do not show any prejudice from that deficient performance. Petitioner responds by arguing that the state court findings of fact do show that he was prejudiced by trial counsel's deficient performance.

Strickland set forth the test for determining when the ineffective assistance of counsel so prejudices a defendant that his sentence must be set aside. First, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance of counsel under the Constitution." *Strickland*, 466 U.S. at 692. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Additionally,

> [w]hen a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer–including an appellate court, to the extent it independently reweighs the evidence--would have

concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695. Finally, "[w]hen a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not harmless. And, the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Of course, as stated above, the prejudice prong of the *Strickland* test is a mixed question of law and fact that is reviewed de novo.[4] Nevertheless, the state court findings of fact should be accorded the presumption of correctness under § 2254(d). The post-conviction trial court held that Petitioner's trial counsel had failed to adequately investigate Petitioner's background and mental history, making the factual findings set forth above in the process. Based upon these findings of fact, the post-conviction trial court found that Petitioner did not suffer any prejudice from the deficient performance, a holding that the Tennessee Court of Criminal Appeals affirmed:

> If the trial attorneys had investigated further, they would have found that the appellant had a long history of violent behavior and anti-social personality disorders. We agree with the trial judge's finding that trial counsel were ineffective in failing to further investigate the background of the accused under the circumstances, but we also agree with Mr. Barrett's testimony and the trial judge's conclusion that it probably would not have been the most prudent trial strategy to use proof of appellant's history of violent behavior and anti-social personality disorders at either the guilt or innocence phase or at the sentencing phase of the trial. As the Supreme Court of the United States noted in *Strickland v. Washington*, 466 U.S. 668, 700 (1984), "Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances

[4] Neither party argues that any error has ever been committed with respect to the performance prong of the *Strickland* test.

> outweighed the mitigating circumstances and, hence, the sentence imposed." Indeed proof of the appellant's psychological history in all probability would not have changed the result, especially in light of appellant's conviction of prior malicious killing while in a federal penitentiary and the other aggravating factors. A decision of counsel relating to a choice of trial or appellate strategy, even if it were proven improvident, could not form the basis for an ineffective assistance of counsel claim.

Jones, 1995 WL 75427, at *2.

Petitioner argues that this conclusion was in error, citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), for the proposition that the capital sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence of less than death." *Id.* Petitioner's reliance upon *Lockett* is misplaced as it involved the presentation of evidence of mitigating circumstances that was deemed not to fit within Ohio's narrow death penalty statute. *See id.* at 594-95. In the instance case, Petitioner did not "proffer" any evidence that the jury was precluded from considering.

Petitioner also relies upon *Glenn v. Tate*, 71 F.3d 1204, 1211 (6th Cir. 1995), for the proposition that "[o]ur sister circuits have had no difficulty in finding prejudice in sentencing proceedings where counsel failed to present pertinent evidence of mental history and mental capacity." *Id.*

Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. We reach this conclusion even considering the evidence presented at the evidentiary hearing below. When a district court in a habeas case orders an evidentiary hearing to settle disputed issues of material fact pursuant to its inherent authority to do so, that evidence could be offered for a variety of purposes, though the most common presumably would be to rebut the presumption of correctness accorded to state court findings of fact. *See Groseclose v.*

Bell, 130 F.3d 1161, 1163-64 (6th Cir. 1997) (stating that "federal courts must defer to state court factual findings, according a presumption of correctness that the petitioner may rebut only with clear and convincing evidence."). However, in the instant case, the additional evidence and factual findings made by the district court do not contradict the factual findings made by the post-conviction trial court. *Compare Abdur'Rahman*, 999 F.Supp. at 1093, *with id.* at 1094-1102. Instead, the additional evidence seems to merely supplement the factual findings made by the post-conviction trial court. *See Pollinzi v. Estelle*, 628 F.2d 417, 418 (5th Cir. 1980) (allowing evidence obtained at an evidentiary hearing to supplement the trial transcript and record).

Even considering the supplemental evidence heard by the district court and outlined in its opinion, Petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance. While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a history of violent character traits. Therefore, we agree with the post-conviction trial court and the Tennessee Court of Criminal Appeals that because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death. Thus, the decision of the district court that Petitioner was prejudiced at the sentencing stage due to his counsel's deficient performance is reversed.

4. Heinous, Atrocious, or Cruel Instruction

On cross-appeal, Petitioner argues that the "heinous, atrocious, or cruel" aggravating circumstance instruction that was given to the sentencing jury was unconstitutionally vague and overbroad, relying upon *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), and *Houston v. Dutton*, 50 F.3d 381 (6th Cir. 1995). The district court concluded that even if the

instruction was vague, any error caused thereby was cured by the Tennessee Supreme Court's application of a constitutional narrowing construction to the aggravating circumstance. The State argues that if the instruction was unconstitutionally vague, any error was harmless due to the jury's finding of other aggravating circumstances.

In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Court addressed the vagueness of a similar instruction and set forth the following standard to employ:

> Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis. Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
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> *Furman* held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was no principled means provided to distinguish those that received the penalty from those that did not. Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Id. at 361-62 (citations partially omitted).

The death penalty instruction in the instant case stated:

> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
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> * * * * * *

(2) the murder was especially heinous, atrocious or cruel, in that it involved torture or depravity of mind;

* * * * * *

In determining whether or not the State has proved aggravating circumstance number two above, you are governed by the following definitions. You are instructed that the word heinous means grossly wicked, or reprehensible, abominable, odious, vile. Atrocious means extremely evil or cruel, monstrous exceptionally bad, abominable. Cruel means disposed to inflict pain or suffering, causing suffering, painful--causing suffering--excuse me--painful. Torture means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. Depravity means moral corruption, wicked, or preverse (sic) act.

Abdur'Rahman, 990 F.Supp. at 987.

In *Maynard*, the Court held that an instruction including as an aggravating factor that the murder was "especially heinous, atrocious, or cruel" was unconstitutionally vague, though the Court left open the possibility that certain limiting constructions of that instruction would be constitutionally acceptable. *Id.* at 364-65. Additionally, it noted that "some kind of torture or serious physical abuse" limiting instruction may pass constitutional muster. *See id.* Following *Maynard*, this court held unconstitutionally vague an instruction stating a specified statutory aggravating circumstance as: "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Houston*, 50 F.3d at 387.

We decline to pass on the constitutionality of the instruction in this case because any error therein was harmless. "[W]henever an aggravating factor has been invalidated in a weighing state,[5] the sentence must be

[5] "Tennessee is a 'weighing' state—that is, the jury determines whether any aggravating circumstances have been established beyond a reasonable doubt by the State and then balances this against any mitigating circumstances found by the individual jurors. If the jury unanimously finds that the aggravators outweigh the mitigators, death must be imposed." *Houston v. Dutton*, 50 F.3d 381, 387 (6th Cir. 1995).

reweighed or analyzed for harmless error if the sentence is to be affirmed." *Coe*, 161 F.3d at 334. The *Coe* court went on to state that:

> In a weighing state . . . when a court invalidates one of the aggravators, it has removed a mass from one side of the scale. There is no way to know if the jury's analysis—how the aggravating and mitigating circumstances balanced—would have reached the same result even without the invalid factor.
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> [I]t is only when the "death sentence has been infected by a constitutionally . . . invalid aggravating factor" that state reweighing is required to preserve the verdict. By definition, though, an error that is harmless does not "infect" the sentence and does not require reweighing by the state.
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>
> We turn, therefore, to analyze this error for harmfulness. The question we must ask is whether the error "had substantial and injurious effect or influence in determining the jury's verdict."

Id. at 334-35. In *Coe*, the error was deemed harmless because the jury made the narrow finding that "the murder was especially heinous, atrocious, or cruel and involved torture," when it had been charged to find that the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *Id.* at 335.

Unfortunately, the jury's verdict form in the instant case was not preserved. However, the Supreme Court of Tennessee made the factual finding that the jury had found the three aggravating circumstances as set forth above in the Background section. *See State v. Jones*, 789 S.W.2d 545, 550 (Tenn. 1990). These factual findings are accorded the presumption of correctness under 28 U.S.C. § 2254(d). *See Sumner*, 449 U.S. at 546 (stating that § 2254(d) "makes no distinction between the factual determinations of a state trial court and those of a state appellate court."). Additionally, Petitioner has neither offered any argument as to why this presumption should not apply, nor any evidence that the jury did not find the three aggravating circumstances.

As the State correctly points out, there was ample evidence to support the aggravating circumstances that Petitioner had been previously convicted of one or more felonies involving the use or threat of violence to the person and that the instant murder was committed while the Petitioner was engaged in committing, or attempting to commit, any first degree murder or robbery. *See State v. Jones*, 789 S.W.2d at 550 (stating that "[t]here is no doubt that the evidence in this case was sufficient to support each of the aggravating circumstances found by the jury."). As quoted above, the *Coe* court found that removing one aggravating circumstance from the sentencing calculus in a weighing state normally would require a re-weighing of the aggravating and mitigating factors. *See Coe*, 161 F.3d at 334. However, in the instant case, as the district court found, "[t]his is a case of no mitigating evidence--none--being offered to the jury despite its availability and abundance." *Abdur'Rahman*, 999 F.Supp. at 1101. Thus, even if the heinous, atrocious, or cruel aggravator is removed form the calculus, there is no mitigating evidence to weigh against the remaining prior felony conviction and felony murder aggravators. Therefore the error was harmless in that it did not have a substantial and injurious effect or influence in determining the jury's verdict.[6]

5. Petitioner's Unanimity Objection to the Sentencing Instructions

Petitioner argues that the sentencing instructions improperly led the jurors to believe that they had to unanimously find any mitigating circumstances and did not specifically instruct them otherwise. Although no direct instruction was given requiring that the jurors find the existence of each mitigating factor unanimously, Petitioner argues that the jury was repeatedly informed that their decisions had to be unanimous, but were not instructed that

[6] This conclusion is not affected by our holding that the district court properly considered the evidence it obtained during the evidentiary hearing because although that evidence contained mitigating circumstances that could have been offered at the sentencing stage, Petitioner does not argue that a re-weighing is necessary on this basis. Thus, in terms of possible re-weighing, we look only to the evidence presented at the sentencing stage.

they did not have to be unanimous as to mitigating circumstances. The district court held that "there is not a reasonable likelihood that the jury interpreted the instructions to require unanimity as to mitigating circumstances. . . . [t]his Court is not persuaded that silence as to finding a mitigating circumstance would likely lead the jury to believe that unanimity was required in this case." *Abdur'Rahman*, 990 F.Supp. at 994. This holding was correct.

In *Mills v. Maryland*, 486 U.S. 367 (1988), the Court held that sentencing instructions that create a substantial likelihood that reasonable jurors might think that they are precluded from considering any mitigating evidence in the absence of unanimity are constitutionally invalid. *See id.* at 384. The standard for reviewing such a challenge to the jury instructions "is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990).

In the instant case, the substantive portions of the trial court's instructions were:

> Our statutory law provides that the jury shall fix punishment after a separate sentencing hearing, to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be unanimous as to either form of punishment.
>
> * * * * * *
>
> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:
>
> * * * * * *
>
> In arriving at the punishment, the jury shall consider, as heretofore indicated any mitigating circumstances which shall include, but not be limited to the following:
>
> * * * * * *
>
> If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved

by the State beyond a reasonable doubt, and that the aggravating circumstance or circumstances outweigh any mitigating circumstances, the sentence shall be death. If the death penalty is the decision of the jury the members of the jury shall then complete the attached form entitled, quote:

Punishment of Death

End quote.

The jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found. Further, the jury must include in its finding that the statutory aggravating circumstance or circumstances so found outweigh any mitigating circumstances. Upon such unanimous finding, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court.

If the jury unanimously determines that no statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; or if the jury unanimously determines that the statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt, but that the said circumstance or circumstances do not outweigh any mitigating circumstances, the punishment shall be life imprisonment.

Abdur'Rahman, 990 F.Supp. at 993. Additionally, at the end of the instructions the trial court stated that "[t]he verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous." *Id.* at 993-94.

Coe is dispositive of this issue. In *Coe*, the jury was similarly told that to impose the death sentence its verdict must be unanimous. *See Coe*, 161 F.3d at 337. This court held:

> We find that the instructions challenged by Coe do not violate Mills. Their language requires unanimity as to the results of the weighing, but this is a far different matter than requiring unanimity as to the presence of a mitigating factor. Nothing in this language could reasonably be taken to require unanimity as to the presence of a mitigating factor. The instructions say clearly and correctly that in order to obtain a unanimous verdict, each juror must conclude that the mitigators do not outweigh the aggravators.

Coe, 161 F.3d at 338. The same can be said of the instructions in the instant case. No statement therein can be said to require unanimity as to the presence of a mitigating factor. Indeed, Petitioner merely argues that the proximity of the terms "unanimous" and "mitigating circumstances" could have led the jury to misinterpret their obligation. This is not enough to create a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of constitutionally relevant evidence.[7]

B. Petitioner's Cross-Appeal Challenging the Denial of his Petition for the Writ of Habeas Corpus as to his Conviction

On cross-appeal, Petitioner argues that the district court's conclusion that he suffered no prejudice from his trial counsel's deficient performance at the guilt stage was erroneous. First, Petitioner argues that due to his trial counsel's conflict of interest and wholly inadequate representation,[8] prejudice can be presumed and therefore need not be shown. Second, Petitioner argues that he did in fact suffer prejudice by trial counsel's delay in preparing for his trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history. In response, the State argues that there was no actual conflict of interest and that Petitioner suffered no prejudice

[7] Additionally, as the district court found, there was no mitigating evidence presented that the jury would have been precluded from properly considering even if the instructions were misinterpreted to require unanimity as to the existence of a mitigating factor.

[8] Petitioner argues that he is entitled to habeas relief on his conviction due to his trial counsel's inadequate performance without having to show prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), and *Rickman v. Bell*, 131 F.3d 1150 (6th Cir. 1997). However, Petitioner points to no facts supporting a claim of wholly inadequate representation.

because he cannot show a reasonable probability that the result of the proceeding would have been different in the absence of trial counsel's deficient performance.

The prejudice prong of *Strickland* relating to ineffectiveness of counsel at the guilt phase asks "the question . . . whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. As stated above, the prejudice prong of *Strickland* is a mixed question of law and fact subject to de novo review. *See id.* at 698. Petitioner's claims must be evaluated keeping in mind the compelling incriminating testimony of both Miller and Norman. Additionally, Petitioner confessed to the crime at the sentencing stage. *See Abdur'Rahman*, 990 F.Supp at 1086.

1. Conflict of Interest

Petitioner argues that he need not show any prejudice as defined by *Strickland* because under *Cuyler v. Sullivan*, 446 U.S. 335 (1980), "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain [habeas] relief." *Id.* at 349-50. Petitioner argues that the third-party fee arrangement created a conflict of interest for his trial counsel because Boyd, the source of payment, was involved in the crime due to having allegedly supplied the shotgun used by Petitioner. However, the next sentence in *Cuyler* is dispositive of Petitioner's claim. *Cuyler* strictly requires that "until a defendant shows that his counsel actively represented conflicting interests, he has not established a claim of ineffective assistance. . . . [T]he possibility of conflict is insufficient to impugn a conviction." *Id.* at 350.

Petitioner fails to show that his trial counsel was actively representing conflicting interests. At most, Petitioner's trial counsel delayed the preparation of his case for too long in anticipation of receiving the balance of his retainer fee. Though Petitioner argues that he was adversely affected by the conflict of interest, he does not allege that his trial counsel was actively representing conflicting interests. Additionally, Petitioner could not make such a showing because as the district court noted, "even if Mr. Boyd's interests were

adverse to Petitioner, Mr. Barrett certainly did not protect the interests of SEGM or Mr. Boyd during the trial and sentencing." *Abdur'Rahman*, 999 F.Supp. at 1091. The district court noted that Barrett elicited testimony about the SEGM from Beard on cross-examination, mentioned the Petitioner's connection with the group during his closing argument, and issued subpoenas for Boyd and Beard to appear at the trial. Thus, it cannot be said that Barrett was actively representing conflicting interests.

Petitioner's reliance upon *Wood v. Georgia*, 450 U.S. 261 (1981), is misplaced. *Wood* involved an Equal Protection challenge to the imprisonment of three probationers because of their inability to make installment payments on fines. The Court did not resolve this issue because it remanded for a determination of whether a conflict of interest existed within a third-party payor arrangement. The probationers were three employees of an adult movie theater and bookstore who had been convicted of distributing obscene materials. As pointed out by Petitioner, the Court noted that "'[a] conflict of interest inheres in every such situation [a criminal defendant being represented by a lawyer hired and paid by a third party] . . . It is inherently wrong to represent both the employer and the employee . . . it is also inherently wrong for an attorney who represents only the employee to accept a promise to pay from one whose criminal liability may turn on the employee's testimony." *Id.* at 271 n.15.

Unlike the instant case, in *Wood* the attorney was representing both the employer and the employees: "[s]ince it was this decision [not to pay the fines] by the employer that placed petitioners in their present predicament, and since their counsel has acted as the agent of the employer and has been paid by the employer, the risk of conflict of interest in this situation is evident." *Id.* at 267. Additionally, the statement from *Wood* upon which Petitioner so heavily relies was contained in a footnote to that opinion and was not the basis of the Court's decision to remand for an evidentiary hearing to determine whether a conflict of interest existed. Instead, the Court stated that "[o]n the record before us, we cannot be sure whether counsel was influenced in his basic strategic decisions by the interests of the employer who hired him."

Id. at 272. In the instant appeal, the record below does not compel the same conclusion. Given the district court's conclusion that Barrett did not protect the interests of Boyd or the SEGM, Petitioner cannot show that Barrett was actively representing conflicting interests and that he is therefore not entitled to a presumption of prejudice at the guilt stage.

2. Prejudice

Petitioner argues that the district court erred in concluding that he did not suffer any prejudice by his trial counsel's deficient performance of delaying his preparation for trial, by the failure to present forensic evidence, and by the failure to present evidence concerning Petitioner's mental history.

First, Petitioner argues that Barrett's decision not to work on the case until he received the balance of the retainer prejudiced him by the lack of any meaningful work being performed and by depriving him of representation during his psychological evaluation. However, Petitioner points to no specific evidence that would raise a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt in the absence of this delay.

Second, Petitioner argues that he was prejudiced by his trial counsel's failure to investigate and present a lab report showing that no blood was found on the clothes he was allegedly wearing during the offense. The district court correctly held that such evidence would not have created a reasonable doubt about guilt because although there was testimony that Petitioner was wearing a long dark coat on the night of the offense, there was no evidence that at the time of the homicide Petitioner was wearing the clothes seized later from his apartment. *See Abdur'Rahman*, 999 F.Supp. at 1096.

Finally, Petitioner argues that trial counsel's failure to investigate his mental history, especially his diagnoses of Post-Traumatic Stress Disorder and Borderline Personality Disorder, prejudiced him at the guilt stage of his trial. The district court held that this was not prejudicial because there was no evidence that Petitioner could have produced an expert to testify that he was insane at the time of the stabbings, or even if one did so testify that testimony would have been effectively countered by evidence from the Middle

Tennessee Mental Health Institute from an examination authorized prior to trial that there was no basis for Petitioner to invoke an insanity defense. A review of this MTMHI document shows that it would be compelling evidence against any insanity defense. Thus, Petitioner cannot show that there is a reasonable probability that the factfinder would have had a reasonable doubt respecting guilt if his trial counsel had investigated and presented evidence of his mental history.

The district court did not err in concluding that Petitioner suffered no prejudice at the guilt stage due to his counsel's deficient performance.

III. CONCLUSION

The district court's finding of prejudice at the sentencing stage is REVERSED and the judgment granting the petition for a writ of habeas corpus as to Petitioner's death sentence is VACATED. The district court's judgment denying the petition for a writ of habeas corpus as to Petitioner's conviction is AFFIRMED.

CONCURRENCE

ALICE M. BATCHELDER, Circuit Judge, concurring. The habeas court in this case believed that it had essentially unlimited discretion to conduct an evidentiary hearing on the petitioner's ineffective assistance of counsel claim. Such discretion is, however, an artifact of a bygone era. As this court recognized in *Mitchell v. Rees*, the modern Supreme Court has substantially pared back the ability of federal courts to retry cases already tried in the state courts. I would therefore hold that the district court in this case improvidently granted the petitioner an evidentiary hearing. I concur in all other parts of Judge Siler's opinion.

I

In 1963, the Supreme Court invested federal habeas courts with broad discretion in most aspects of collateral review of state criminal judgments. Contending that the common law conceived of the Great Writ as a remedy available for any kind of governmental detention contrary to fundamental law, the Court in *Fay v. Noia* declared that "federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in . . . state court proceedings." *Fay*, 372 U.S.

391, 426 (1963). This broad conception led the Court to hold that even a petitioner who had procedurally defaulted his claims in state court could obtain habeas relief, subject to the district court's "discretion" to deny relief when the orderly procedure of the state courts had been deliberately bypassed. *Id.* at 434, 438. In parallel fashion, the Court empowered federal habeas courts to conduct evidentiary hearings even when a petitioner had failed to develop the facts in state court proceedings. "In every case," the Supreme Court wrote in *Townsend v. Sain*, the district judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." *Townsend*, 372 U.S. 293, 318 (1963). *Townsend* limited the discretion of habeas courts in this regard only by requiring that evidentiary hearings be held under six circumstances that would call into question the integrity of state court factfinding. *Id.* at 313.

The generation following *Fay* and *Townsend* has witnessed a sea-change in the law of habeas corpus. This change has been spurred by an increased attentiveness to considerations of comity and the values of "our federal system." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The idealistic predictions of *Fay* and *Townsend* that federal district judges, mindful of their delicate role in the maintenance of proper federal-state relations, would not employ their discretion to subvert the integrity of state criminal justice, had been proven wrong. *Townsend*, 372 U.S. at 318; *see also Fay*, 372 U.S. at 433 (suggesting that the plenary power of inquiry on federal habeas corpus would not create incentives for defendants to withhold claims in state proceedings). The law reviews and the popular press echoed with calls for the unelected federal judiciary to desist from frustrating the outcomes of democratic process, particularly in capital cases. *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L.Rev 333 (1998) (tracing the history of the countermajoritarian difficulty); *see also* Thomas Goldsmith, *Activists Want Nixon Impeached: Group Takes Message to Centennial Park*, The Tennessean, Mar. 26, 2000, at 1B (noting current calls for the impeachment of a

federal district court judge on the ground that his personal bias against the death penalty makes him unfit to hear cases in which it is a factor). *Fay* was overruled. *See Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977).

Recognizing that in a federal system, the States should have the first opportunity to address and correct violations of state prisoners' federal rights, and that *Fay* had undervalued the important interests served by state procedural rules, the Supreme Court replaced *Fay*'s "deliberate bypass" standard with a cause-and-prejudice inquiry. *Coleman*, 501 U.S. at 731, 750. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is *barred* unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.* at 750 (emphasis supplied). In view of the significant harm suffered by States when federal courts failed to respect state procedural rules, federal court "discretion" to consider a habeas petitioner's federal claims was inappropriate when the petitioner had deprived the state courts of an opportunity to address those claims in the first instance.

Townsend's holding with respect to evidentiary hearings, too, was overruled. Just as a district court had no discretion to consider federal claims that a habeas petitioner had not submitted to the state courts, neither could it have discretion to allow a petitioner to develop facts that had not been fairly presented to the state courts. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7-8 (1992) (stating that it is "irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim"). Thus, in *Keeney v. Tamayo-Reyes*, the Supreme Court applied the cause-and-prejudice standard to determine whether a state prisoner who had failed to develop material facts in state court was entitled to an evidentiary hearing on habeas corpus. *Id.* at 11.

Keeney was a case in which a petitioner sought a federal evidentiary hearing but did not receive one. *See id.* at 4.

Taking his cue from this fact, Judge Siler interprets *Keeney* to mean that a showing of cause and prejudice *requires* a habeas court to conduct an evidentiary hearing, but that even in the absence of such a showing, the court retains discretion to hold a hearing. *See ante* at __. In my view, neither the language nor the reasoning of *Keeney* will support this interpretation. In addition, the Supreme Court's recent pronouncements in *Williams v. Taylor*, 120 S. Ct. 1479 (2000), strongly corroborate a reading of *Keeney* that limits the authority of habeas courts to order evidentiary hearings.

The *Keeney* Court granted certiorari to decide "the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings." *Keeney*, 504 U.S. at 5. Ultimately, the Court determined that "the 'cause-and-prejudice' standard embodies the correct accommodation between the competing concerns implicated in a federal court's habeas power." *Id.* at 7. As a purely textual matter, nothing in the Court's framing of the question, or in its resolution of that question, suggests that the Court was restricting its holding to those circumstances in which a habeas petitioner is "entitled" to an evidentiary hearing.

More importantly, the logic that the Court followed to arrive at the cause-and-prejudice standard will not admit of such a construction. The Court based its holding on a quintet of values embedded in our federal system: comity, finality, judicial economy, channeling of claims to the appropriate forum, and uniformity in the law of habeas corpus. *Id.* at 8-10. It is difficult to understand how any of these values would be served by a system that entitled state prisoners to evidentiary hearings only upon a showing of cause and prejudice, but nevertheless invested the habeas courts with bottomless discretion to order hearings where they are not required. Such a system still would deny the States the opportunity to correct their own constitutional errors, would multiply the opportunities to relitigate convictions, and would consume scarce judicial resources.

Of particular concern is the disruption to the values of proper forum allocation and uniformity that would attend survival of the *Townsend* doctrine. The Supreme Court likened the former value to the requirement of exhaustion,

noting: "Just as the State must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the State a full and fair opportunity to address and resolve the claim on the merits." *Id.* at 10. A doctrine that allows a habeas court to conduct an evidentiary hearing where the petitioner has, without cause, failed to develop facts in state court re-engineers this two-way street into a blind alley. Even though the state court is the appropriate forum for resolution of factual questions in the first instance, *Townsend* creates "incentives for the deferral of factfinding to later federal court proceedings"—which can only "degrade the accuracy and efficiency of judicial proceedings." *Id.* at 9.

Similarly, the *Keeney* Court rested its holding on a symmetry between the jurisprudence of procedural default and that governing factfinding in the habeas courts. "There is no good reason to maintain in one area of habeas law a standard that has been rejected in the area in which it was principally enunciated," wrote the Court. "And little can be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum." *Id.* at 10. A dogged fidelity to *Townsend* disrupts this symmetry. Absent a showing of cause and prejudice, a habeas court would have no discretion to entertain a claim that had been procedurally defaulted in state court, but would have discretion to conduct an evidentiary hearing on a claim raised but insufficiently developed in state court, even where the petitioner did not show cause and prejudice for his failure to develop the factual record in the state court. Given the importance that the *Keeney* Court ascribed to uniformity in the law of habeas corpus, that cannot be a correct reading of the case.

This Court has recognized that *Keeney* implicitly withdrew the discretion that *Townsend* had granted. In *Mitchell v. Rees*,[1] we reversed a district court for ordering an

[1]To the extent that *Mitchell* suggested that a district court is without authority to hold an evidentiary hearing without first finding that one of the factors listed in 28 U.S.C. § 2254(d) applies, I agree with Judge Siler that its statement is "overbroad". *See Keeney*, 504 U.S. at 1720 n.5 (noting that § 2254(d) "indicates no

evidentiary hearing on a habeas petitioner's *Batson* challenge without requiring the petitioner to establish either (1) cause and prejudice for his failure to adequately develop the material facts in the state court proceedings, or (2) that not holding an evidentiary hearing would result in a fundamental miscarriage of justice. *Mitchell*, 114 F.3d 571, 579 (6th Cir. 1997). "[A] district court abuses its discretion," we said, "by ordering such a hearing without first requiring the petitioner to make the requisite showing." *Id.* at 577. We have been joined in this understanding by at least one other Circuit. *See Mathis v. Zant*, 975 F.2d 1493, 1497 (11th Cir. 1992).

Our understanding is buttressed by a case decided by the Supreme Court just this Term, *Williams v. Taylor*. In *Williams*, the Court interpreted 28 U.S.C. § 2254(e)(2), a statute enacted four years after the decision in *Keeney*. Section 2254(e)(2) provides: "If the [habeas] applicant has failed to develop the factual basis of a claim in State court proceedings, the court *shall not* hold an evidentiary hearing on the claim unless the applicant" satisfies certain conditions. 28 U.S.C. § 2254(e)(2) (emphasis supplied). In deciding the level of fault connoted by the term "fail", the Court determined that the opening clause of § 2254(e)(2) is essentially a codification of the holding in *Keeney*: "Congress intended to preserve at least one aspect of *Keeney*'s holding: prisoners who are at fault for the deficiency in the state-court record must satisfy a heightened standard to obtain an evidentiary hearing." *Williams*, 120 S.Ct. at 1489. As this language suggests, the Supreme Court itself does not read *Keeney* as deciding when a petitioner is *entitled* to an evidentiary hearing; rather, the case sets forth what a petitioner must do in order to obtain one. *See also id.* at 1488 ("We required the prisoner [in *Keeney*] to demonstrate cause and prejudice excusing the default before he *could* receive a hearing on his claim . . . ." (emphasis supplied)).

Keeney, *Mitchell*, and *Williams* thus command that a petitioner who has not developed facts in state court must

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assumption that the presence or absence of any of the statutory exception will determine whether a hearing is held").

justify his failure to do so through a showing of cause and prejudice before he may present those facts to a federal habeas court.

II

In Tennessee's post-conviction courts, petitioner Abdur'Rahman claimed that his trial counsel had rendered ineffective assistance by failing to investigate his mental health and criminal histories sufficiently to paint a sympathetic picture of his abusive childhood and resulting serious mental illness at sentencing. The state court conducted an evidentiary hearing, at which it considered the testimony of one Dr. Barry Nurcombe; Abdur'Rahman's school, military, and prison records; the transcript of a previous trial; records of the Middle Tennessee Mental Health Institute; records of social services departments; the affidavit of Mark Jones, Abdur'Rahman's brother; and a great deal of other evidence. At the conclusion of the hearing, the court held that Abdur'Rahman's trial counsel had been constitutionally deficient—reasonable attorneys would have investigated the accused's mental health and criminal histories. The court concluded, however, that counsel's faulty performance did not prejudice Abdur'Rahman. The evidence introduced at the hearing, the court noted, contained extensive documentation that Abdur'Rahman had had a past of profound violence, but no serious mental illness. Deciding that this information "looks like a mine field for any trial attorney to tiptoe through," the court denied post-conviction relief.

In his petition for federal habeas relief, Abdur'Rahman renewed his contention that trial counsels' deficient performance at sentencing had resulted in prejudice. Over the State's objection, the district court conducted an evidentiary hearing on the ineffective assistance claim. Although the State confronted the district court with *Mitchell*, the court cited an unpublished district court order for the proposition that the granting of an evidentiary hearing is discretionary. The district court proceeded to consider a significant volume of evidence, including the testimony of seven live witnesses, that was not presented to the state courts. Largely on the basis of this evidence, the district court concluded that

Abdur'Rahman had been prejudiced because his trial attorneys could have shown such mitigating circumstances as childhood abuse, serious mental illness, and the defendant's good qualities.

In doing so, the district court erred. Upon authority of *Keeney* and *Mitchell*, the district court could not order an evidentiary hearing until Abdur'Rahman showed cause for his failure to develop the factual record fully in the state courts. Ordinarily we would vacate the order partially granting the writ of habeas corpus and the order for the evidentiary hearing, *Mitchell*, 114 F.3d at 579, and remand the matter to the district court to afford Abdur'Rahman the opportunity to bring forward evidence establishing cause and prejudice, *Kenney v. Tamayo-Reyes*, 504 U.S. at 11. In this case, however, such a disposition is unnecessary; the evidence that Abdur'Rahman adduced at the federal evidentiary hearing is plainly insufficient to undermine confidence in the jury's sentence. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). As Judge Siler points out, the additional evidence presented to the habeas court merely supplemented the factual findings made by the post-conviction trial court. What the state court said in 1995 holds true today: "It is unrealistic to expect the jury to change the result because of testimony about the petitioner's troubled background and mental illness in the face of a prior murder conviction which is added to two additional aggravating circumstances including the heinousness of the killing." I therefore concur that the order granting the writ as to Abdur'Rahman's death sentence should be reversed.

CONCURRING IN PART, DISSENTING IN PART

R. GUY COLE, JR., Circuit Judge, concurring in part, dissenting in part. Because I would affirm the district court's determination that Abdur'Rahman's counsel was constitutionally ineffective at sentencing and that the writ should be granted as to this issue, I respectfully dissent from that portion of Judge Siler's opinion.

As an initial matter, I agree with Judge Siler that the district court properly ordered an evidentiary hearing, under its discretion to do so, and properly considered the evidence presented at this hearing. I also note that the concurrence's

invocation of the bugaboo of overreaching federal courts does not reflect the reality of federal habeas review. *See* 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 482 (1990) (reporting that, in 1987 and 1988, only 1.1% of habeas corpus petitioners received a full hearing at the district court).

Abdur'Rahman's counsel was constitutionally ineffective at sentencing due to counsel's utter failure to investigate or present available mitigating evidence. In order to prove ineffective assistance of counsel, Abdur'Rahman must fulfill the familiar two-prong requirement of *Strickland v. Washington*, 466 U.S. 668 (1984).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. As noted by the majority, we review this mixed question of law and fact de novo. *See id.* at 698; *McQueen v. Scroggy*, 99 F.3d 1302, 1311 (6th Cir. 1996).

The district court and both Tennessee post-conviction courts that examined this case determined that Abdur'Rahman's counsel's performance was deficient. The state does not challenge this determination. I survey counsel's deficiencies here because I believe that they help illuminate why Abdur'Rahman's sentence of death "resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687.

Counsel's performance, as it related to preparation for and presentation at the sentencing hearing, was constitutionally inadequate. "[W]hen a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation." *Mapes v. Coyle*, 171 F.3d 408, 426 (6th Cir. 1999); *see Baxter v. Thomas*, 45 F.3d 1501, 1512 (11th Cir. 1995) (stating that defense counsel was obligated to investigate mitigating

mental health evidence for sentencing). Counsel failed to ask the trial court to declare Abdur'Rahman[1] indigent or to ask the court for funds for investigation or experts; failed to hire an independent mental health expert; failed to investigate the nature of Abdur'Rahman's prior convictions; failed to contact and present available witness testimony from Abdur'Rahman's family at sentencing; failed to investigate Abdur'Rahman's numerous mental health records or educational, military, and prison records; and failed to inquire about Tennessee records regarding Abdur'Rahman's mental health or background or introduce evidence from these at his sentencing hearing. In sum, counsel completely failed to investigate and present Abdur'Rahman's mental health history, his institutional history, or other mitigating evidence.

The majority suggests that, armed with this evidence, defense counsel could have made a legitimate tactical decision not to present the evidence, which is now in the record but was not presented to the jury, and that we should defer to this decision. Unfortunately, defense counsel's "tactical decision" in this case was to not prepare for the capital sentencing hearing of their client. "[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

Further, and more importantly, I disagree with the majority's finding that Abdur'Rahman was not prejudiced by counsel's failure. To demonstrate prejudice, Abdur'Rahman "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. He need not show that counsel's performance more likely than not affected the outcome of the case. *See id.* at 693-94. Instead, "[w]hen a defendant challenges a death sentence . . ., the question is whether there is a reasonable probability that, absent the

[1]I use Abdur'Rahman's present name throughout when referring to him, even in the context of events that occurred or documents created when the petitioner went by the name of Jones.

errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 696.

Counsel's failure to investigate or properly prepare for sentencing resulted in the presentation of essentially no mitigating evidence to the jury at the sentencing phase. Despite counsel's assertion in his opening statement that he would put on other witnesses, Abdur'Rahman and his wife were the sole witnesses at sentencing and their testimony related to the circumstances of the offense for which he was found guilty. It did not address Abdur'Rahman's history of abuse, his mental health treatment, or other relevant aspects of his life. This is so despite the fact that the jury should "'not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Penry v. Lynaugh*, 492 U.S. 302, 317 (1989) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original)).

Although the jury found three aggravating factors at sentencing, it had nothing to weigh this information against; it is unsurprising that comparing those three factors with the dearth of mitigating evidence that the jury chose to impose a death sentence on Abdur'Rahman. However, "[t]he Eighth Amendment requires a jury to consider the circumstances of the crime and the defendant's background and character during the sentencing phase of a capital trial." *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997). The jury's failure to consider mitigating evidence "risks erroneous imposition of the death sentence." *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990) (quoting *Eddings v. Oklahoma*, 455 U.S. at 117, n.* (O'Connor, J., concurring)).

Unbeknownst to the jury determining Abdur'Rahman's fate, mitigating evidence existed and was available for presentation at his sentencing hearing. If counsel had performed adequately, the jury could have learned that that Abdur' Rahman has a history of traumatic abuse as a child, that he had a long history of mental health problems and

treatments, and, finally, that Abdur'Rahman had previously been a productive member of society.

The abuse suffered as a child by Abdur'Rahman, mostly at the hands of his father, a military policeman, was inhumane and shocking.[2] Dr. Raymond Winbush, who testified before the district court, stated that Abdur'Rahman's "is singularly the worst case of abuse I have come across in 25 years being an academic psychologist . . . I can't even in my memory remember anything that remotely comes close to some of the things I read."

This abuse was attested to by the petitioner, the petitioner's half-sister, who was not contacted by counsel but

[2] As the district court stated:

> During the hearing in this Court, Nancy Lancaster, Petitioner's half-sister, testified about the abuse and difficulties Petitioner experienced during his childhood. Although some of the information Ms. Lancaster related was based on statements made by other family members, the Court was very impressed with Ms. Lancaster's credibility and demeanor.
>
> Ms. Lancaster testified that she and the Petitioner share a common mother, who abandoned Ms. Lancaster and her two brothers when she was an infant. Petitioner's mother put her three children in a taxi, drove them to the woods, and left them. Petitioner's mother later married Petitioner's father, James Jones, Sr. Three more children were born of that marriage – James (Petitioner), Mark, and Sylvia.
>
> Petitioner's statements to mental health providers [over the course of his life] provide a vivid description of the abuse Petitioner suffered at the hands of his father. Petitioner received regular beatings with a leather strap from his father. Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat. To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit. None of this extraordinary abuse, which constitutes relevant mitigating evidence, was heard by the jury.

Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1097-98 (M.D. Tenn. 1998) (footnote and citations to record omitted).

was available to testify, and the petitioner's brother, Mark Jones, who likewise was not contacted by counsel but stated in an affidavit that he would have been willing to testify at trial.[3] This abuse, while not a justification for petitioner's criminal conduct, is relevant, mitigating evidence that should have been presented to the jury.

Abdur'Rahman had a persistent history of psychiatric disorders and mental health problems. A "defendant[] who commit[s] criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). The mental health of the defendant has consistently been determined to be relevant, probative information to which the jury is entitled when making a life or death decision. *See, e.g., Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000) (finding that the petitioner was prejudiced by counsel's failure to investigate and present mitigating evidence at sentencing); *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir. 1995). The jury, however, heard nothing at sentencing regarding Abdur'Rahman's mental health history.

In the record before us, we have the testimony of Dr. Samuel Craddock, who was part of the team that diagnosed Abdur'Rahman for the state of Tennessee for purposes of competency to stand trial and a potential insanity defense without knowledge of his history of mental illness. Craddock testified that Thorazine and Prolixin, the medications prescribed for Abdur'Rahman in prison, were powerful anti-psychotic medications which raised a question of whether he was mentally ill, and that the symptoms exhibited by Abdur'Rahman were like those of someone with a borderline personality disorder. Dr. Diana McCoy testified that she diagnosed Abdur'Rahman with post-tramatic stress disorder and a possible borderline personality disorder. Dr. Robert Sadoff offered a similar diagnosis as McCoy.

Included in the records before this court are a department of social services report from the state of Washington stating

[3] Petitioner's brother subsequently committed suicide.

that Abdur'Rahman had a "paranoid personality" and "personality pattern disorder;" Philadelphia school records which include a request for psychiatric services; and prison records, including psychiatric examinations, some which state that Abdur'Rahman does not have a mental illness or psychosis, but does have a history of documented suicide attempts, and some which indicate that Abdur'Rahman was diagnosed with other disorders, including a severe psychopathic personality and a "psychotic depressive reaction and antisocial personality." Abdur'Rahman's prison records also indicate that Abdur'Rahman was frequently and heavily medicated during at least some of his time in prison and that he beat his head against the wall while in prison. Records from the New Jersey Department of Human Services document his 1967 stay while a youth at the Trenton Psychiatric Hospital, where he was diagnosed with a sociopathic personality disturbance and antisocial reaction with depression, and records from the Davidson County Sheriff's Department show that Abdur'Rahman beat his head against a wall after his arrest there. Further, the record indicates that others in Abdur'Rahman's family had mental health problems. Many of these records were available to defense counsel through the MTMHI report, prepared for the purpose of determining Abdur'Rahman's competence to stand trial;[4] however, counsel failed to investigate or present any of this mitigating information to the jury. Nor did counsel present to the jury a mental health expert who could have testified regarding Abdur'Rahman's mental health problems.

Further, testimony from the trial of Abdur'Rahman's conviction for second-degree murder for the killing of a fellow inmate – a conviction that supported one of the aggravating circumstances – indicated, in the opinion of one expert, that Abdur'Rahman had a borderline personality disorder and schizoid personality. This evidence could have

[4]The fact that Abdur'Rahman was found competent to stand trial does not, of course, alter the fact that his mental health problems should be considered by the jury at sentencing. *See Blano v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991).

been mitigating with respect to the petitioner's mental health, as well as with respect to the prior murder.

Abdur'Rahman's wife could have her personal observations about his mental health, including the fact that her husband had conversations with people who did not exist, banged his head against the wall, and believed that the couple would give birth to the next Messiah. She also stated that she told defense counsel that a psychiatrist should examine her husband.

Despite his childhood abuse and extensive mental health history, Abdur'Rahman was able to comport his conduct to societal norms and to engage in productive activities. His former fiancé, about whom he informed defense counsel, but whom counsel failed to contact, later testified that, when she knew him in 1983, Abdur'Rahman held a steady job, attended college, and volunteered with a Quaker youth group at a large housing project. She stated that the petitioner was a caring and gentle person who sincerely held Christian beliefs.

While acknowledging that some of this evidence would have been mitigating, the majority adopts the rationale of the state court of appeals that the evidence that defense counsel failed to investigate or present also contained instances of violent conduct and anti-social actions by Abdur'Rahman. This treatment of the evidence by the majority contradicts the emphasis by the courts that evidence considered mitigating by the person facing a death sentence should be allowed to the greatest extent possible to insure a full and fair determination by the jury. *See, e.g., Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). Further, the majority overlooks that the jury already had much of this evidence of violent or prior criminal conduct before it and that the presentation of available, relevant evidence at sentencing would not have subjected Abdur' Rahman to additional statutory aggravating factors. The mitigating elements of this evidence would have served, instead, to present the jury with an accurate and complete picture of the person they were sentencing – the very purpose of a capital sentencing hearing. In addition, the majority ignores the mitigating potential of nearly all of the available evidence and the fact that some of the evidence that counsel failed to investigate or present does not involve violence or

harmful behavior by Abdur'Rahman. *See Williams v. Taylor*, 120 S. Ct. 1495, 1514 (2000) (noting that the presence of unfavorable records did not justify "the failure to introduce the comparatively voluminous amount of evidence that did speak in [petitioner's] favor").

Had counsel adequately performed, the jury weighing whether a death sentence was an appropriate punishment for Abdur'Rahman would have had a representative picture of the person they were sentencing, instead of the one-sided account upon which they based their decision. Like the petitioner recently before the Supreme Court, Abdur'Rahman has "a constitutionally protected right . . . to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer." *Williams*, 120 S. Ct. at 1513. Given the total lack of mitigating evidence presented at Abdur'Rahman's sentencing hearing, "counsel's conduct so undermined the proper functioning of the adversarial process that the [sentencing hearing] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686; *see also Austin*, 126 F.3d at 848; *Glenn v. Tate*, 71 F.3d 1204, 1210 (6th Cir. 1996). I respectfully dissent.

98-6568/6569

FILED

DEC 2 2 2000

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR'RAHMAN,

Petitioner-Appellee/Cross-Appellant,

v.

RICKY BELL, WARDEN,

Respondent-Appellant/Cross-Appellee.

ORDER

BEFORE: SILER, BATCHELDER, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Cole would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green

Leonard Green, Clerk

RECEIVED
OCT 10 2001
LEONARD GREEN, Clerk

FILED
OCT 10 2001
LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ABU-ALI ABDUR' RAHMAN, formerly known as JAMES JONES,	)	
Appellee/ Cross- Appellant	)	
vs.	)	**Nos. 98-6568, 98-6569**
RICKY BELL, Warden,	)	**CAPITAL HABEAS CORPUS**
Appellant/ Cross-Appellee	)	

APPELLEE ABU-ALI ABDUR'RAHMAN'S MOTION TO WITHHOLD THE MANDATE AND GRANT REHEARING *EN BANC* OR REMAND FOR FURTHER PROCEEDINGS

Earlier today, the Supreme Court of the United States denied the Petition for a Writ of Certiorari filed by Appellee Abu-Ali Abdur'Rahman ("Appellee") to review this Court's judgment in this case. Accordingly, Appellee respectfully moves this Court for an Order withholding its mandate and directing either that the case will be reheard *en banc* or that the case will be remanded to the district court for further proceedings. This Court's authority to issue such an Order in light of the highly unusual intervening circumstances present in this case is clear. *Compare First Gibraltar Bank v. Morales*, 42 F.3d 895 (5th Cir. 1995) (granting

rehearing, vacating judgment, and reaching different result after denial of certiorari based on intervening circumstances), *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989) (same), and *Alphin v. Henson*, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977) (same) *with Nyyssonen v. Bendix Corp.*, 356 F.2d 193, 193 (1st Cir.), *cert. denied,* 385 U.S. 846 (1966) (denying leave to file motion for rehearing after denial of certiorari when motion "contains nothing of substance that could not have been asserted in a timely motion in response to our original opinion").

Specifically, this Motion rests on five distinct intervening developments that have occurred since this Court last considered this case: (i) intervening decisions of this Court that create a conflict with the decision in this case that can only be resolved *en banc*; (ii) the State's express argument to the Supreme Court, in opposition to Appellee's Petition for a Writ of Certiorari, that the patent inconsistencies between the panel opinion in this case and other Sixth Circuit precedent "should be resolved *by the Sixth Circuit* and not by a grant of certiorari" (emphasis added); (iii) an intervening decision of the U.S. Supreme Court with which the panel opinion in this case conflicts; (iv) the State's concession that the panel opinion in this case was simply wrong in a critical respect; and (v) an important intervening procedural Order of the Tennessee Supreme Court. Particularly given that this Court's previous Order denying rehearing *en banc*

strongly suggests that the Court was narrowly divided at that time, Appellee's counsel file this Motion based on a sincere, good faith belief that these five intervening developments, alone or in combination, will lead the full Court to reconsider the case.

The relevant events relating to the issuance of the mandate in this case are as follows. On September 13, 2000, a divided panel of this Court entered its opinion reinstating Appellee's death sentence. 226 F.3d 696 (reversing the district court's decision, which is published at 999 F. Supp. 1073). On January 9 and 11, 2001, the panel entered a stay of mandate pending the filing and disposition of a Petition for a Writ of Certiorari. Appellee subsequently filed his Petition. Today, the Supreme Court denied the Petition.[1]

The Clerk of the Supreme Court will provide a certified copy of the Supreme Court's Order to this Court. *See* S. Ct. R. 45.3. Absent a further Order of this Court, this Court's current stay of mandate (which is in place pending the filing and disposition of Appellee's Petition for a Writ of Certiorari) will then expire. *See* Fed. R. App. P. 41(d)(2). This Court, however, has the broad power to issue a distinct stay pending Appellee's further request for rehearing *en banc* and to grant rehearing subsequent to the denial of certiorari. *See* Fed. R. App. P. 41(d)(1);

[1] The Supreme Court also denied a motion by the State to strike the discussion by an *amicus curiae* of affidavits sworn to by a majority of the trial jurors stating that they likely would *not* have voted to impose the death penalty had the available mitigation evidence been presented to them.

supra at 1-2 (collecting cases). For the reasons described in the Argument section below, this case presents extraordinary circumstances that merit withholding the mandate and granting *en banc* consideration, or at least remanding to the district court for further consideration.

BACKGROUND

I. State Court and District Court Proceedings.

The factual and procedural history of this case is described in Appellee's Petition for a Writ of Certiorari (*see* Appendix 1, *infra*) and can be summarized here briefly.[2] In 1987, a Tennessee jury convicted Appellee of murder and sentenced him to death. He properly exhausted appeals in the state system, including state post-conviction appeals. The state post-conviction courts found that Appellee's trial counsel had been ineffective in at least thirteen different instances, but concluded that Appellee had not been prejudiced as a result.

The United States District Court for the Middle District of Tennessee subsequently vacated Appellee's death sentence and remanded the case to the state courts for resentencing. After hearing extensive testimony and reviewing

[2] All of the briefs and pleadings filed with the Supreme Court at the certiorari stage are reproduced as Appendices to this Motion. Appellee's counsel respectfully suggest that this Court's consideration of this Motion will be aided greatly by a review of the certiorari filings.

numerous exhibits, the district court found that Appellee's trial counsel had been grievously ineffective in failing to introduce five different classes of mitigating evidence, as well as evidence mitigating the principal aggravating circumstance underlying the death penalty. The district court found the available mitigation evidence to be "very impress[ive]," "vivid," "significant," "extremely credible," "compelling," and "overwhelming." The district court found the failure of Appellee's trial counsel to provide this evidence to the sentencing jury to be "grave," "serious," "very significant," "substantial," "breathtaking[]," and "grievous."

The district court noted two facts that buttressed its holding that Appellee had been prejudiced at sentencing by the ineffective assistance of his counsel. First, under Tennessee law, the death penalty cannot be imposed if even a single juror votes for a life sentence. The district court was fully persuaded "that at least one juror would have voted for a life sentence rather than the death penalty." Second, in a quotation on which a panel majority of this Court would later rely heavily (albeit for the remarkable purpose of *reinstating* Appellee's death sentence, *see infra*), the district court found that "[t]his is a case of no mitigating evidence–none–being offered to the jury despite its availability and abundance."

II. Sixth Circuit Proceedings.

On the State's appeal, a panel of this Court (divided two-to-one) reversed and reinstated Appellee's death sentence. The State had *a single* theory on appeal, which a majority of the panel (Judges Siler and Cole) *rejected*: that the district court was forbidden from expanding the factual record on Appellee's ineffective assistance of counsel claim.[3]

A different majority (Judges Siler and Batchelder, over a lengthy dissent by Judge Cole), however, proceeded *sua sponte* to summarily reject the district court's extensive factual findings that Appellee had been prejudiced by the failure of his counsel to introduce the voluminous available mitigating evidence. The entirety of the majority's analysis was set forth in essentially two sentences: "While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Appellee's motive for killing a fellow prison inmate and a history of violent character traits." 226 F.3d at 708-09.

In reaching this conclusion, the majority did not cite any precedent permitting it to reach the prejudice issue *sua sponte*. Indeed, the majority did not

[3] In its appeal, the State never challenged the district court's finding that trial counsel's performance was constitutionally deficient. Furthermore, in its appeal the State never challenged the district court's determination that the full district court record supported a finding of prejudice and the granting of habeas relief.

even acknowledge that its holding rested upon a fact-bound argument that (i) the State had waived by not raising on appeal, (ii) the State still did not embrace when Appellee repeatedly pointed out the waiver, and (iii) no member of the panel even raised at oral argument.

The panel majority also did not discuss the district court's conclusion that at least a single juror likely would have found the mitigating evidence compelling. Nor did the majority acknowledge this Court's extensive precedent attributing special significance in the prejudice inquiry to the failure to introduce any mitigating evidence.

Judges Siler and Batchelder separately rejected Appellee's protective cross-appeal. Appellee maintained that he had been unconstitutionally sentenced to death based on a "heinous, atrocious, or cruel" ("HAC") instruction that this Court had held unconstitutionally vague in *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999), and *Houston v. Dutton*, 50 F.3d 381 (6th Cir.), *cert. denied*, 516 U.S. 905 (1995). The majority found that error harmless, however, because it concluded that Appellee would have been sentenced to death even if that aggravator had not been utilized, given the total failure of Appellee's trial counsel to introduce any mitigating evidence: "[I]n the instant case, as the district court found, '[t]his is a case of no mitigating evidence–none–being offered

to the jury despite its availability and abundance.'" 226 F.3d at 711 (citing the district court's decision, 999 F. Supp. at 1101).

In finding the use of the HAC aggravator to be harmless, the majority totally refused to consider the mitigation evidence introduced in the federal district court, concluding (erroneously, *see infra*) that Appellee had waived any such request. The majority did not explain on what basis the Court could deem Appellee's argument to be waived while simultaneously *sua sponte* reinstating Appellee's death sentence on an argument waived by the State.

Appellee sought rehearing and rehearing *en banc* on the ground that the panel majority's decision conflicted with a consistent line of Sixth Circuit precedent holding that arguments not raised on appeal are deemed waived. The Court called for a response, but denied rehearing *en banc* in an Order suggesting that the vote was narrowly divided. *See* Order of Dec. 22, 2000 ("less than a majority of the judges . . . favored the suggestion"). The Court did, however, stay its mandate pending the filing and disposition of a Petition for a Writ of Certiorari.

III. Supreme Court Proceedings.

Appellee filed a Petition for a Writ of Certiorari, supported by three sets of *amicus* briefs. A group of law professors – including Laurence Tribe and James Liebman – argued that certiorari should be granted because the panel majority

violated due process and basic principles of procedural regularity by (i) reinstating Appellee's death sentence based on an argument consciously waived by the State, and (ii) failing to give Appellee even the opportunity to submit briefing or oral argument on that issue. (*See* Appendix 4, hereto). The Cornell Death Penalty Project argued that certiorari should be granted because empirical evidence established that jurors would have been persuaded by the available mitigating evidence that Appellee's trial counsel failed to introduce. (*See* Appendix 5, hereto). Hence, Appellee had been prejudiced by the ineffective assistance of his trial counsel. Finally, a consortium of national and state mental health, social worker, and children's groups argued that certiorari should be granted because the panel majority misconstrued the available mitigating evidence, including particularly medical testimony regarding Appellee's mental health. (*See* Appendix 6, hereto).

In the Argument Section, *infra*, Appellee will discuss the substance of his grounds for seeking certiorari as they relate to this Motion. But the State's approach in opposing certiorari is itself a critical intervening development that merits discussion from the outset. The State's position was that, whatever manifest errors the panel majority's decision presented, they did not give rise to a clear *inter-circuit* conflict meriting Supreme Court review. For example, the State maintained that in reaching the question of prejudice *sua sponte*, the panel majority

had at most created "an intra-circuit conflict [that] *should be resolved by the Sixth Circuit* and not a grant of certiorari." St. Br. in Opp. 7 (Appendix 3, hereto) (emphasis added). The State also maintained that this case presented no circuit conflict regarding the relevance of a single juror's ability to hold out for a life sentence because the panel majority totally failed to say anything about that issue *at all*. *Id.* at 17. In response to Appellee's argument that other circuits would have found prejudice because Appellee's trial counsel had failed to introduced *any* mitigating evidence, the State took the position that the panel majority was *wrong* and that such evidence had in fact been introduced. *Id.* The State maintained that position notwithstanding that the panel majority, in addressing the HAC aggravator, had specifically relied on trial counsel's failure to introduce any evidence to *support* reinstating the death penalty.

ARGUMENT

In its current posture, this case is the subject of five intervening developments that, alone or in combination, plainly merit *en banc* consideration by this Court. At the very least, a remand to the district court is appropriate. Particularly given the ultimate finality of the death sentence *sua sponte* reinstated by the panel majority in this case, the full Court's careful consideration is warranted.

I. Intervening Decisions Of This Court Establish A Clear Conflict Between The Panel Majority's Decision And Sixth Circuit Precedent Holding That The Complete Failure To Introduce Mitigating Evidence Strongly Supports A Finding Of Constitutionally Ineffective Assistance Of Counsel.

The district court in this case attributed considerable significance to the fact that Appellee's trial counsel completely failed to introduce any mitigating evidence at sentencing. "This is a case of no mitigating evidence–none–being offered to the jury despite its availability and abundance." 999 F.Supp. at 1101. In effect, Appellee's trial counsel provided no reason at all to spare his life.

The panel majority relied on this finding of the district court, but for precisely the opposite reason. The majority invoked it not to support Appellee's claim of ineffective assistance of counsel, but rather reasoned that, although Appellee had been sentenced pursuant to a "heinous, atrocious, or cruel" aggravator that is unconstitutional under Sixth Circuit precedent, that error was harmless. 226 F.3d at 711. Specifically, the majority reasoned that, because Appellee's trial counsel had introduced no mitigating evidence, the jurors would have sentenced Appellee to death based on the remaining aggravators even if the HAC aggravator had not been utilized. In other words, the panel majority found the constitutional error harmless precisely *because* Appellee's counsel had provided no reason to save his life.

The panel majority's decision flatly conflicts with intervening decisions of this Court, and this intra-circuit conflict can only be resolved by *en banc* review. Intervening Sixth Circuit precedent establishes beyond peradventure that counsel's failure to introduce any mitigating evidence calls the death penalty seriously into question, directly contrary to the panel majority's reasoning that it *supports* reinstating a death sentence. Thus, in *Skaggs v. Parker*, 235 F.3d 261 (6th Cir. 2000), *cert. denied*, 2001 U.S.LEXIS 7348 (2001), a case that (like this one) involved trial counsel's failure to present psychiatric testimony in mitigation, the Court found prejudice. "[T]he jury that sentenced Skaggs to death did not have accurate information about the mental status of the person it was sentencing. If counsel had performed adequately, the jury would have had significant mitigating evidence to consider." Even more recently, this Court has emphasized its "many recent decisions vacating death sentences due to ineffective assistance," including particularly "based upon inadequate penalty phase preparation by trial counsel." *Greer v. Mitchell*, No. 98-4330, 2001 U.S. App. LEXIS 19599, at *22 n.2, **27-28 (6th Cir. Sept. 4, 2001). It is bitterly ironic that the *Greer* opinion cites as support for that line of precedent Judge Cole's *dissent* in this case. *Id.* at *22 n.2. *See also Cone v. Bell*, 243 F.3d 961, 977 (6th Cir. 2001) (failure to present evidence in mitigation is a clear "red flag").

Granting rehearing *en banc* on this question is supported by two further considerations. First, the State opposed certiorari in the Supreme Court on the ground that the panel majority was *wrong* when it agreed with the district court that Appellee's counsel introduced no mitigating evidence. *See* St. Br. in Opp. 17 (Appendix 3, hereto) ("[T]he record does not support petitioner's assertion that counsel wholly failed to introduce any mitigating evidence. Thus, contrary to petitioner's argument, this case does not squarely present the prejudice issue where the jury was provided with no reasons to spare petitioner's life."). It is fundamentally unfair to execute Appellee on two totally irreconcilable premises: (i) that the use of the unconstitutional HAC aggravator at Appellee's trial was harmless error because Appellee's counsel introduced no mitigating evidence; and (ii) that Appellee was not prejudiced by the concededly ineffective assistance of his counsel because that counsel did introduce mitigating evidence.[4]

Second, although not itself an intervening development, it remains the case that the panel majority's reasoning is fundamentally flawed because one of the two votes to reinstate the death penalty in this case is internally inconsistent and conflicts with Sixth Circuit precedent. Judge Batchelder joined Judge Siler in

[4] This was not the only instance in which the State sought to avoid certiorari on the perverse ground that the panel majority was wrong. Thus, the State argued that the HAC aggravator previously held unconstitutional by this Court is in fact constitutional under Supreme Court precedent. See St. Br. in Opp. 14 (Appendix 3, hereto).

holding that the use of the unconstitutional HAC aggravator was harmless. But in a separate concurrence, Judge Batchelder made clear that she agreed that Appellee had not been prejudiced by the ineffective assistance of his counsel because the jurors would inevitably have imposed the death penalty based on the remaining two aggravators, including particularly the *HAC aggravator*. "What the state court said in 1995 holds true today: 'It is unrealistic to expect the jury to change the result because of testimony about the petitioner's troubled background and mental illness in the fact of a prior murder conviction which is added to two additional aggravating circumstances *including the heinousness of the killing*.'" 226 F.3d at 719 (emphasis added). Because that aggravator was unconstitutional under Sixth Circuit precedent, Judge Batchelder's reliance on that aggravator to determine that Appellee was not prejudiced by the ineffective assistance of his counsel presents a clear intra-circuit conflict meriting *en banc* review.[5]

[5] It also bears emphasizing that the state courts, in making an assessment of the evidence upon which Judge Batchelder relied, did not have the benefit of the extensive mitigation proof introduced in the federal district court. Particularly relevant here, the district court found that competent counsel would have proved to the jury that Appellee's "prior murder conviction" of a fellow prisoner was the result of his uncontrollable reaction to being assaulted and raped by a gang led by the victim.

II. *En Banc* Consideration Is Warranted Because Intervening Developments Demonstrate That The Panel Majority's Decision Conflicts With Sixth Circuit Precedent Holding That Fact-Bound Questions Not Raised On Appeal Are Waived, And Furthermore That The Panel Majority's Decision Rests On A Fundamental Misconception Regarding Appellee's Contentions On Appeal.

The panel majority in this case reversed the district court on a ground not raised by the State in its appeal. The State did not contest the district court's finding of prejudice based on the record developed in the district court. Appellee repeatedly pointed out the waiver, which the State did not dispute. *E.g.*, Appellee's Br. on Appeal 14; Trans. of Oral Arg. 11, 45. In the Supreme Court, the State maintained that this issue presented only "an intra-circuit conflict [that] should be resolved by the Sixth Circuit and not by a grant of certiorari." State Br. in Opp. 7 (Appendix 3, hereto).[6] Alternatively, the State maintained that the panel's decision was consistent with Sixth Circuit precedent holding that the Court may raise an issue *sua sponte* in order to avoid a fundamental miscarriage of justice. *Id.*

[6] This Court's precedent – which the panel majority failed to even acknowledge – is in accord with the rule applied by other circuits, which clearly would have declined to consider the prejudice issue – and therefore would have reached a result contrary to that of the panel majority in this case – because the State failed to raise the issue in its appeal. *See, e.g.*, *Rivera v. Dep't of Corrections*, 915 F.2d 280, 283 (7th Cir. 1990) (per Posner, J.) ("[T]he issues in habeas corpus as in other civil cases are framed by the parties, so that if the state waives its best arguments it must live with the consequences."); *Wilson v. O'Leary*, 895 F.2d 378, 384 (7th Cir. 1990) (per Easterbrook, J.) ("All arguments for reversal must appear in the opening brief, so that the appellee may address them. . . . Procedural rules apply to the government as well as to defendants."); *Demarest v. Price*, 130 F.3d 922, 942 n.9 (10th Cir. 1997); *Boardman v. Estelle*, 957 F.2d 1523, 1537 (9th Cir.) (per curiam), *cert. denied*, 506 U.S. 904 (1992).

The State cannot now avoid *en banc* review having argued in the Supreme Court that any conflict between the decision below and Sixth Circuit precedent should be resolved by this Court alone. Furthermore, intervening precedent establishes that the State was wrong to contend that the panel majority's decision could be reconciled with circuit precedent on the theory that this Court will decide an issue *sua sponte* to avoid a miscarriage of justice. In *Vance v. Spencer County Public School District*, 231 F.3d 253, 258 n.3 (6th Cir. 2000), the Court explained that it will address only those arguments raised on appeal. In *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 984 (6th Cir. 2000) (emphasis added), the Court explained that the exception to that rule is when the Court faces "*a pure question of law* that cries out for resolution." The panel majority's decision in this case, by contrast, addressed an entirely *fact-bound* question – *viz.*, whether the district court record established prejudice – not a question of law. It therefore is not surprising that the panel majority cited no authority at all – whether from the Sixth Circuit or any other court – explaining on what authority it reached the question of prejudice *sua sponte*.[7]

[7] No doubt, the panel majority's failure to even acknowledge that it was deciding the prejudice question *sua sponte* undermined Appellee's claim that the decision below created a circuit conflict meriting Supreme Court review. As noted in the text *supra*, the State opposed certiorari on the ground that this Court had not announced any principle of law at all, and thus had not announced any principle that could be said to conflict directly with the precedent of another circuit.

Even if the Court were in the future to recognize a broad "miscarriage of justice exception," the State has never explained what injustice would result from having Appellee resentenced in light of the mitigation proof that constitutionally adequate counsel would have introduced at Appellee's trial. Nor has the State explained why, even if the Court were to reach the issue of prejudice *sua sponte*, it would not give Appellee the opportunity at least to brief the question or present oral argument before resentencing him to death. To the contrary, all that has resulted is an exceedingly dangerous precedent that ought to be overturned post-haste by the *en banc* Court. This prejudice issue in this case, as in many death penalty cases, was heavily fact-bound and nuanced; to hold that the Court will decide it without any input from the parties is deeply troubling and a marked departure from the Court's otherwise consistent precedent.

There has also been an important intervening development with regard to the panel majority's fundamentally unjust, *one-sided* application of the waiver principle. Inexplicably, the majority reinstated petitioner's death sentence on an issue waived by the State but refused to consider an argument for sustaining the district court's judgment on the ground that the argument had been waived by Appellee. Specifically, in holding that the use of an unconstitutional HAC aggravator was harmless, the majority refused to consider the mitigating evidence

compiled by the district court on the ground that Appellee had waived any such argument.

The intervening development is the State's total failure in the Supreme Court to contest that the panel majority's decision both (i) was utterly and completely wrong to hold that Appellee had waived reliance on the district court record with respect to the HAC aggravator, and (ii) was inexplicable in its one-side application of the waiver rule. In his Petition for a Writ of Certiorari, Appellee specified in the strongest possible terms:

> The majority's assertion that petitioner's counsel had not requested that the Sixth Circuit consider the federal court record with respect to the HAC aggravator, Pet. App. 24a n.6, is totally false, and we specifically defy respondent to defend it. Petitioner expressly argued that "[t]he error was not harmless" in light of "the ineffective assistance of counsel that pervaded the sentencing hearing in this trial," and in the same sentence referred the court to a six-page single-spaced discussion of the mitigation evidence developed in the federal court. Pet'r C.A. Reply Br. 9-15 nn.6-7, 21. We also invite respondent to explain on what conceivable basis the Sixth Circuit could have been justified in reinstating petitioner's death sentence by *sua sponte* reaching the prejudice argument waived by the state while simultaneously purporting to hold that petitioner also must be sentenced to death because, although an unconstitutional instruction was used at petitioner's trial, that error was harmless because his counsel had *waived* on appeal a particular evidentiary argument.

Pet. for Cert. at 20-21 n.12 (Appendix 1, hereto) (emphasis in original). Despite this perfectly explicit challenge, the State said nothing at all in response, unable to provide a single sentence in defense of the panel majority's ruling. The State's

effective acknowledgment that this Court's order reinstating Appellee's death sentence was erroneous is a significant intervening event that justifies reconsideration.

III. *En Banc* Consideration Is Warranted Because The Panel Majority's Decision Conflicts With An Intervening Supreme Court Decision.

The panel majority in this case reinstated Appellee's death sentence based on its view of how the jury would have regarded the "balance" of aggravating and mitigating circumstances had it been presented with the available mitigating evidence. 226 F.3d 696, 707. The majority's approach thus contrasted starkly with the district court's view that a death sentence properly should be vacated if it is clear that, notwithstanding the balance of aggravating and mitigating circumstances, the jurors would have deemed the defendant insufficiently morally culpable for the murder.

Subsequent to the panel's decision, the Supreme Court made clear that the district court's approach was the correct one. In *Penry v. Johnson*, 121 S. Ct. 1910, 1920-21 (2001) ("*Penry II*"), the Court held that the Constitution requires that a capital sentencing jury be given the opportunity to reach a "reasoned moral response to [the mitigating and aggravating] evidence in rendering its sentencing decision." In this respect, the Court reaffirmed its conclusion in an earlier decision in the same case that the sentencing determination must account for our societal

view "'that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.'" *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). To the same effect is the Supreme Court's recent pronouncement – not acknowledged by the panel majority in this case – that a death sentence properly is vacated based on substantial mitigating evidence "even if it *does not* undermine or rebut the prosecution's death-eligibility case." *Williams v. Taylor*, 529 U.S. 362, 398 (2000).

It is perfectly clear that if the panel majority had followed the standard for determining prejudice articulated in the Supreme Court's intervening decision in *Penry II*, it would have affirmed the district court's finding of prejudice. Of particular note, neither the State nor the panel majority expressed any doubt that the exceedingly graphic and compelling mitigating evidence found by the district court (but never even mentioned by the panel majority) demonstrated that Appellee was not sufficiently morally culpable to be put to death for his crime insofar as he had suffered vicious abuse, had a grossly dysfunctional upbringing, suffered from

serious mental illness, and had made substantial contributions to society.[8] For example, the district court found:

> Petitioner's father made him take off his clothes, placed him hog-tied in a locked closet, and tethered him to a hook with a piece of leather tied around the head of his penis. Petitioner's father struck Petitioner's penis with a baseball bat. To punish him for smoking, Petitioner's father required him to eat a pack of cigarettes, and when he vomited, was made to eat the vomit.

999 F. Supp. at 1098. The district court also found that Appellee "had a family history of serious mental conditions" – his sister attempted suicide on several occasions, while his brother committed suicide several days after his arrest for sexually and physically abusing his children – and that Appellee himself had been diagnosed as having a "paranoid" and "passive aggressive" personality and as being "very sick and in need of immediate commitment," "in serious need of therapy," and "highly disturbed." *Id.* at 1098 & n.33. Moreover, the district court found that, "despite his mental health problems," Appellee had "held a steady job, attended college, and performed volunteer work with a Quaker youth group at Cabrini Green, a large, infamous public housing development in Chicago known for its poverty and violence." *Id.* at 1099. Finally, the district court found that the principal aggravating circumstance invoked by the prosecution to justify Appellee's death

[8] The district court's findings regarding this testimony are summarized in the Petition for Certiorari at 12-14 (Appendix 1, *infra*).

sentence – a prior homicide while in prison – was in reality Appellee's defensive reaction to being raped by a gang led by the victim. *Id.* at 1100.

IV. *En Banc* Consideration Is Warranted Because Intervening Developments Demonstrate That Appellee Was Seriously Prejudiced By The Panel Majority's Failure To Address The Significance Of A Single Juror's Ability To Hold Out For A Life Sentence.

En banc reconsideration also is appropriate in light of an intervening development regarding the panel majority's determination to reinstate Appellee's death sentence without addressing the relevance of the fact that, under Tennessee law, a single juror who was persuaded by mitigating evidence could require the imposition of a life sentence. The district court relied on that fact in finding that Appellee was prejudiced by the ineffective assistance of his counsel. Appellee's Petition for a Writ of Certiorari demonstrated that four circuits – the Third, Fifth, Seventh, and Eighth – have embraced the district court's approach, employing a more relaxed prejudice standard in cases arising from states with the same single-juror rule as Tennessee. *See* Pet. for Cert. at 25 & n.13 (Appendix 1, hereto). Appellee argued that certiorari should be granted because the panel majority, by rejecting the district court's finding of prejudice, brought the Sixth Circuit into conflict with those other courts of appeals.

The State opposed certiorari on this issue on only a single ground: "The court of appeals did not specifically address the potential effect of the omitted

evidence upon a single juror, and nothing in the opinion below suggests that the court either adopted or rejected petitioner's argument . . . ." State Br. in Opp. 17 (Appendix 3, hereto). In this respect, the State sought to avoid Supreme Court review on the ground that this Court's opinion effectively ignored an important issue of law that was critical to the case, and thereby could not be said to create a circuit conflict. (No doubt, the panel majority's failure to address the point arose from the fact that it reinstated Appellee's death sentence *sua sponte* without giving Appellee's counsel any opportunity to brief or argue the relevant legal principles.) Our justice system cannot, or at least should not, embrace judicial decision making of this sort when the death penalty is at stake. At the very least, *en banc* consideration should be granted so that this Court can determine if it should in fact reject the considered view of four other circuits and, if so, provide Appellee a fair and reasonable opportunity to seek review in the Supreme Court.

V. *En Banc* Consideration Is Warranted Because, On The Majority's Rationale, Appellee Is Entitled To The Benefit Of An Intervening Tennessee Supreme Court Order.

Finally, rehearing also should be granted in light of an intervening Order of the Tennessee Supreme Court providing that issues not presented in a discretionary application to that Court following an adverse decision of the Tennessee Court of Criminal Appeals shall be deemed exhausted. *See* Tenn. S. Ct. R. 39.[9]

[9] Tenn. S. Ct. R. 39 provides:

> "In all appeals from criminal convictions or post-conviction relief from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

Alternatively, this Court should modify its judgment to permit the district court to consider the effect of this Order.

The recent promulgation of Tenn. S. Ct. R. 39 is highly relevant to this case. The district court held that Appellee had failed to exhaust and had therefore procedurally defaulted a number of claims by failing to present them to the Tennessee Supreme Court in an application for discretionary review. The district court thus refused to consider a number of Appellee's claims of prosecutorial misconduct which, in fact, were properly exhausted according to Rule 39.[10] Appellee did not challenge that determination in this Court, principally because he

[10] These claims of prosecutorial misconduct include: whether the prosecution should have disclosed the statements of certain witnesses, the redacted portions of certain police reports, a memorandum in the prosecution's file concerning a bank account in the victim's name, the statement of the victim's brother together with lab reports about the victim, and information about Petitioner's bank account; whether the prosecution unconstitutionally influenced the co-defendant's testimony which was given as part of a plea bargain; whether the prosecution provided false information to the state mental health evaluators; whether the prosecution improperly manipulated the testimony of a key witness (in addition to the co-defendant); and whether the prosecution unconstitutionally misled defense counsel regarding Petitioner's prior murder conviction. *See* 999 F. Supp. at 1082, n.8.

had prevailed in the district court, and also because substantial page limits constrained the number of points he could raise.

In light of the Tennessee Supreme Court's intervening enactment of Rule 39, it is clear that the district court's legal conclusion was erroneous. Because the comity interests underlying the district court's finding of procedural default are therefore not in fact present, it would be appropriate for this Court to resolve the claims that the district court refused to resolve.[11] At the least, the Court should remand to the district court to permit it to consider those claims in the first instance.[12]

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court issue an Order providing that this Court's mandate shall be withheld and the case shall be reheard *en banc* or the case will be remanded to the district court for further consideration.

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[11] Appellee has not defaulted those claims in this Court. Appellee's argument only became apparent when the Tennessee Supreme Court issued its Order. In addition, for the reasons stated in the text, it was reasonable for Appellee (having prevailed in the district court) not to continue to pursue those claims in this Court. Finally, there can be no reasonable dispute that, if this Court is going to consider issues not raised in the appellate briefing, it must do so evenhandedly. Hence, the Court would be justified in raising the Tennessee Supreme Court's ruling *sua sponte*.

[12] Appellee is preparing to file with the district court a protective motion under Fed. R. Civ. P. 60(b) that is based on the Tennessee Supreme Court's rule.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first class mail, postage prepaid, on this 9th day of October, 2001 upon:

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STATE v. ABU-ALI ABDUR'RAHMAN (formerly James Lee Jones)

PROSECUTORIAL MISCONDUCT

This Appendix describes most of the prosecutorial misconduct in Mr. Abdur'Rahman's case as supported by the judicial record. Citations to the record are: FT (federal district court transcript), FEx. (exhibit introduced into evidence in the district court hearing), P-CT (state post-conviction hearing transcript), and T (the original murder trial transcript).

A. The Context of the Prosecutorial Misconduct in this Case.

While the district court found that substantial evidence was never investigated by trial counsel and therefore never presented to the jury in Mr. Abdur'Rahman's case, the district court never addressed the merits of Mr. Abdur'Rahman's prosecutorial misconduct claims. However, although these claims were dismissed by the district court on procedural default grounds, in the district court evidentiary hearing Mr. Abdur'Rahman introduced the evidence supporting those claims. The state has never challenged this evidence, and the underlying facts supporting the prosecutorial misconduct claims cannot be reasonably disputed.

The instances of prosecutorial misconduct in this case establish more than just the withholding of significant and compelling evidence. When considered in their totality, the instances of prosecutorial misconduct establish a deliberate pattern and scheme of prosecutorial fraud from indictment to sentencing. This persistent and deceptive scheme did more than to keep the jury from hearing all the evidence; the ultimate effect was to portray an entirely false and misleading picture of every important aspect of this case.

The prosecutor in this case, Assistant District Attorney John Zimmermann, has a long

history of engaging in various forms of misconduct and deceptive practices.[1]

Zimmermann knew that obtaining a death sentence in this case would be problematic. He testified before the district court that in any capital case the prosecution must "explain everything to the jury." (FT 905). Zimmermann also perceived that in Davidson County, at least, capital jurors must be convinced "not beyond a reasonable doubt, but beyond a shadow of a doubt" if they are to impose a sentence of death. (FT 905-908).

Further, Zimmermann knew that this case presented its own specific problems that would make it particularly difficult to obtain a death sentence. In a memo to Assistant District Attorney Eddie Barnard (FEx. 42), and in his testimony in the District court (FT 908-09, 912-13), Zimmermann specifically identified some of the weaknesses in the prosecution's case, such as the following: (i) no one other than co-defendant Devalle Miller could identify Mr. Abdur'Rahman as the assailant; (ii) because only Miller could identify Mr. Abdur'Rahman as the assailant, it would be necessary to cut a deal with Miller in exchange for his testimony;[2] and, (iii) although "photographs of the decedent's house show blood spattering all over the kitchen ... [if Mr. Abdur'Rahman] did wear his coat the entire time he obviously was not present when the stabbing occurred." (FEx 42 at Bates stamp pp. 000677-8). Zimmermann acknowledged in his memo that, "The case is not open and shut on the issue of guilt." (Id. at p. 000681). In this same memo and in other documents in his file, Zimmermann also was aware that Mr. Abdur'Rahman had potential mental state defenses that could be raised at both the guilt and sentencing stages of

[1] Attached hereto as Appendix C is a memorandum describing instances in which courts in other cases have reprimanded Zimmermann for engaging in many of the same kinds of prosecutorial misconduct that occurred in Mr. Abdur'Rahman's case.

[2] It should be noted that pursuant to the recently issued policy of the Davidson County District Attorney General, "The death penalty will not be sought in cases where the evidence consists of the uncorroborated testimony of a single eyewitness or of a cooperating codefendant or accomplice." See, *Office of the District Attorney General, 20th Judicial District, Death Penalty Guidelines*, ¶ 9 (attached as Appendix G hereto) (emphasis added).

the case. (Id. at 000678-81).

Because of these and other problems with the case, Zimmermann violated his ethical and legal obligations to present the truth. He withheld key information and he invented his own facts to suit what he considered to be a winning theory for the prosecution.

B. The Types of Prosecutorial Misconduct in this Case.

The prosecutorial misconduct in this case can be divided into four general categories: (i) pretrial misrepresentations; (ii) Brady violations; (iii) improper manipulation of key witness testimony; and (iv) deceptive presentation of inadmissible evidence.

(1) Pretrial Misrepresentations.

(a) MTMHI Letter.

The first set of prosecutorial pretrial misrepresentations can be found in Zimmermann's February 10, 1987 letter to Middle Tennessee Mental Health Institute ("MTMHI") in connection with its psychological evaluation of Mr. Abdur'Rahman. (FEx. 34). At the time, Mr. Abdur'Rahman was not being represented by any attorney: his first attorney, Neal McAlpin, had effectively withdrawn from the case and his trial attorney, Lionel Barrett, had deliberately refrained from working on the case while awaiting the $10,000 balance of the promised retainer which he never received. (FT 694-5). Zimmermann's letter, therefore, was MTMHI's only outside source of information about Mr. Abdur'Rahman's prior criminal history and the circumstances surrounding the offense, and it was filled with fabrications.

> First, with regard to the Mr. Abdur'Rahman's prior murder conviction, the letter states: During those proceedings, and according to Court records, the defendant, through his counsel, moved the Court for a competency hearing and psychiatric evaluation as to his sanity. After those examinations were concluded the Court ruled that the defendant was competent and the Court directed the defendant to proceed to trial. There appears to be no evidence from the records submitted to us in that proceeding that the defendant relied upon an insanity defense at trial.

(FEx. 34, p. 3). This was a deliberate falsehood. According to the transcript of the 1972 trial, which was in the prosecution's file, Mr. Abdur'Rahman did rely on the insanity defense. (FEx. 131). Indeed, as reflected in this transcript, at the 1972 trial Mr. Abdur'Rahman presented expert psychiatric testimony that he was insane, and the government's own psychiatric expert conceded that he could not be sure that Mr. Abdur'Rahman was able to control his behavior at the time of that offense.[3] Even Zimmermann's internal memorandum to Assistant District Attorney Eddie Bernard referred to the fact that Mr. Abdur'Rahman raised an insanity defense at his 1972 trial. (FEx. 42 at Bates stamp p.000679).

Second, the letter states that Mr. Abdur'Rahman "was not associated with [] particular religious organization." (Id. at p. 3). That was not true, for Mr. Abdur'Rahman was associated with the Southeastern Gospel Ministry (the "SGM"), a religiously oriented organization. It is not clear what Zimmermann knew about the SGM at the time he wrote the letter, but there is nothing in the prosecution's file that would support this statement. Zimmermann ultimately learned from Devalle Miller about the involvement of the SGM, but he never gave any of that information to the defense or to MTMHI. (P-C₮, Vol. III, pp. 13-43, discussed below).

Third, the letter states: "The police theorize that the defendant was relatively new to Nashville and making attempts to become entrenched as a drug distributor in Nashville;" and

[3] Under the Tennessee definition of insanity at the time, the testimony given by both psychiatrists in Mr. Abdur'Rahman's 1972 trial would have supported an insanity defense. See Graham v. State, 547 S.W.2d 531 (Tenn. 1977) (Tennessee definition of insanity); State v. Clayton, 656 S.W.2d 344, 346 (Tenn. 1983) (burden of proof is on the state to prove sanity beyond a reasonable doubt).

"Essentially, the victim in this case was wholesaling the Marijuana and that is the position the defendant wanted to assume." (Id. at 3-4). Such a theory was pure invention. It is not reflected in the police files. It is patently false and the state can point to no evidence that might support the theory.

Fourth, the letter states, "The victim in this case [Patrick Daniels] distributed marijuana from his home but did not distribute Cocaine." (Id. at 3). In fact, Daniels did distribute cocaine as reflected by the information obtained by the prosecution from the victim's brother. (FEx. 57). See also the police report describing "white powder" in one of the bathrooms (FEx. 3), the police report identifying a hypo syringe cap taken from Norma Norman (FEx. 4), and the autopsy report indicating that cocaine was found in the victim's urine (FEx. 14). (As discussed below, these police reports were never turned over to the defense.)

Fifth, the letter states, "The defendant had taken on the name of Scarface in the local drug community and that is all many of the people knew him by." (Id. at 4). If in fact the police ever thought that the Mr. Abdur'Rahman had been called Scarface, there is no reference in the prosecution's file, the police file, or any other known place, indicating that the Mr. Abdur'Rahman had assumed that name in the "drug community" or that that was the only name by which some people knew him.

Sixth, the letter states:

> He [the Mr. Abdur'Rahman] had advised the police and his attorney that the man he murdered in prison was a homosexual and that he murdered him in self-defense to prevent being raped. Further checking of court records reflect that the defendant was a leader of a prison gang attempting to gain control over the victim's gang and that the murder was a cold blooded premeditated murder, which reflects why the Federal judge gave the defendant the maximum punishment of life imprisonment when he could have sentenced the defendant to as little as ten (10) years for Murder in the Second Degree.

This, perhaps the most damaging of Zimmermann's statements to MTMHI, is a deliberate falsehood in several respects and, like Zimmermann's drug distribution theory mentioned above, is pure invention. The 1972 court records in fact confirm the Mr. Abdur'Rahman's claim that the 1972 murder was provoked by homosexual assaults on him. (FEx. 49 [Lowe's letter to Zimmermann], 131, 136 [Bishop deposition], and 142). There is no reference in the court records or federal prison records to any "prison gang." (See Bishop Deposition, FEx. 136). The term "gang" was Zimmermann's own creation out of thin air. (See Zimmermann's testimony, FT 1018-9). There was no evidence or testimony in the 1972 trial that the prior murder was a "cold blooded premeditated murder." In fact, both the prosecution psychiatrist and the defense psychiatrist who testified in that trial agreed that the killing was likely the result of a loss of control on the Mr. Abdur'Rahman's part. Finally, this statement fails to mention that the 1972 trial judge recommended in his final judgment that Mr. Abdur'Rahman be committed to an institution where he may receive psychiatric treatment. (FEx. 131).

While Zimmermann presented his fiction in his letter to MTMHI, he never furnished MTMHI (or the defense) with actual relevant information sitting in his file. For example, Zimmermann never informed MTMHI that shortly after the Mr. Abdur'Rahman's arrest and within forty-eight hours of the offense, Mr. Abdur'Rahman banged his head against the wall and the floor and was placed in a padded cell for two days. (FEx. 7, 8). Zimmermann also never furnished MTMHI with any of the records pertaining to Mr. Abdur'Rahman's 1972 prior murder conviction, where Mr. Abdur'Rahman presented a viable insanity defense, or Mr. Abdur'Rahman's 1970 prior assault conviction, which included a motion of the prosecution for a psychological evaluation prompted in part by the Mr. Abdur'Rahman's headbanging. (FEx. 49, 131).

Zimmermann's statements to MTMHI go beyond zealous advocacy. They step over the line into pure fraud and deception. These statements were of significance in MTMHI's evaluation of the Mr. Abdur'Rahman. As Dr. Craddock testified, MTMHI had virtually none of the Mr. Abdur'Rahman's prior institutional records, and MTMHI relied entirely upon Zimmermann's letter for information regarding the circumstances surrounding the offense. (FT 105-6, 109, 151-2).

(b) <u>Misrepresentations About Prior 1972 Murder</u>.

Zimmermann defrauded Mr. Barrett regarding Mr. Abdur'Rahman's prior 1972 murder conviction. Zimmermann falsely told Barrett that the 1972 murder was not a response to homosexual rape, as Mr. Abdur'Rahman claimed (and as was the case), but rather was part of a "turf war in the prison between the two gangs as to who would control the drug trade in the prison." (P-CT, Vol. III, p 169, FEx. 130). In the post-conviction proceeding, Zimmermann explained his strategy:

> "My purpose on that was to hopefully keep from getting into this 1972 murder, and if Mr. Barrett could see what we had and understand what kind of potential rebuttal evidence that it would confine the defendant's testimony since I'd already provided to him the documentary evidence as part of discovery. I wasn't concerned about a discovery violation. But it was basically a tactic that I've learned that in cases like this if you have evidence that is a little bit questionable, that could raise an appellate issue if it's introduced --"

(P-CT, Vol. III, p. 170, FEx. 130).[4]

In fact, contrary to Zimmermann's testimony in the post-conviction hearing, he had not provided Mr. Barrett with "the documentary evidence as part of discovery." Zimmermann had not provided Mr. Barrett with either the 1972 trial transcript or the letter Zimmermann had received from Magistrate David Lowe, the attorney who prosecuted the 1972 case. (FEx. 45). This

[4] Zimmermann called himself to the stand over the objection of Mr. Abdur'Rahman's state post-conviction counsel. The Court overruled the objection and permitted Zimmermann to testify even though he was an attorney representing the State at the hearing and he had given no prior notice that he intended to testify.

documentary evidence, which should have been turned over under Brady, supported Mr. Abdur'Rahman's version of the circumstances surrounding the 1972 murder, and it contradicted Zimmermann's statement that the murder was part of a "turf war" between "gangs" over the "drug trade" in the prison. None of the evidence mentioned either a turf war, gangs, or drugs. Instead, all of the documentary and testimonial evidence confirmed that the 1972 murder was related to homosexual attacks on the Mr. Abdur'Rahman.

Zimmermann attempted to justify his false statements to Mr. Barrett regarding the 1972 killing by claiming that he received his information from Mr. Delagrange, the F.B.I. agent Zimmermann brought to the Mr. Abdur'Rahman's trial. (FT 976-7). There are at least four problems with Zimmermann's attempted justification.

First, Zimmermann developed his theory about the 1972 killing, that it was part of a gang war over the drugs in the prison, before he ever talked to Delagrange. As mentioned above, Zimmermann set out this fabricated theory in his February 10, 1987, letter to MTMHI. (FEx. 34). It appears from the records in this case and Mr. Delagrange's testimony, however, that Zimmermann did not talk to Mr. Delagrange until after June 4, 1987. (See FEx. 61, 66, 70, and Delagrange's Depos., FEx. 136, at p. 21).

In this connection, it should be pointed out that according to correspondence in the prosecution's file, Zimmermann was attempting to portray the 1972 killing as a drug-related event before he ever talked to Delagrange . In his March 30, 1987 letter to David Lowe, Zimmermann said:

> I find it very difficult to believe that a Federal Judge would sentence an inmate to a life sentence in what purports to be nothing more than a defensive killing. Particularly when the circumstances underlying the killing involve a sexual attack upon the defendant. Therefore, it is imperative that we obtain information regarding the facts of this

> case and be prepared to offer them during the penalty phase of the trial.

(FEx. 45). In his April 10, 1987, letter to U.S. Attorney Henry Hudson, seeking permission to talk to David Lowe about the case, Zimmermann wrote:

> I am also interested in the fact that the previous Murder for which the defendant received a life sentence may pattern somewhat the manner in which the present case occurred.

(FEx. 48). From this correspondence and the other circumstances involved in this matter, it is clear that Zimmermann was actively pursuing information about the 1972 murder that would fit his fabricated theory that Mr. Abdur'Rahman was involved in "drug turf" wars. It is therefore clear that Zimmermann's false statements to Mr. Barrett about the 1972 murder were not the product of mere mistake on Zimmermann's part.

Second, Zimmermann gave this story to Mr. Barrett before the trial, and therefore before he brought Delagrange to Nashville. (Barrett testimony, FT 294-5).

Third, Delagrange had no knowledge of drugs or "gangs" in the prison. He therefore had no basis whatsoever for affirming the theory Zimmermann was advancing to Mr. Barrett. (See Delagrange's Depos., FEx. 136, at pp. 17-20). After Zimmermann made his first contact with Mr. Delagrange, he interviewed Mr. Delagrange maybe two or three times over the telephone and again after Mr. Delagrange came to Nashville. Zimmermann, therefore, had the opportunity to find out from Mr. Delagrange what his knowledge was and the basis of his knowledge. (Delagrange Depos., FEx. 136, at p. 34). It must be presumed that when Zimmermann introduced Mr. Delagrange to Mr. Barrett, which occurred in the hall of the courthouse in the middle of trial, Zimmermann was aware that Mr. Delagrange did not have the knowledge that Zimmermann represented to Mr. Barrett.

Fourth, there can be no satisfactory reason or explanation for Zimmermann's deceptive strategy in light of the fact that Zimmermann possessed documentation that contradicted the story he was conveying to the defense.

Mr. Barrett relied upon Zimmermann's misrepresentations about the circumstances of the 1972 murder. (FT 299). Although Mr. Barrett would not use the word "deceived," he testified in this proceeding that he was certainly "misled" by Zimmermann "as to the strength of any potential testimony my client might give along those lines." (FT 308).

(2) Brady Violations.

(a) 1972 Transcript.

The District court has held that the prosecution's failure to turn over the 1972 transcript of Mr. Abdur'Rahman's prior murder trial constituted a Brady violation but that, "standing alone," this violation was not material and was therefore not grounds for relief. 999 F. Supp. at 1089-90. As has been documented, that failure does not stand alone. Further, when viewed in the context of the other instances of prosecutorial misconduct, together with the ineffective assistance of defense counsel, this Brady violation takes on greater significance.

The prosecution was put on notice that the Mr. Abdur'Rahman's mental health might be an issue in the case. In response to Mr. McAlpin's motion, (FEx. 22), the trial court ordered the Mr. Abdur'Rahman's evaluation at MTMHI. (FEx. 28). On March 24, 1987, Mr. Barrett wrote Zimmermann and explained that he was "going to seriously look at my client's mental condition...." (FEx. 41). Zimmermann acknowledged receipt of this letter and the possibility that Mr. Barrett might raise an insanity defense. (FEx. 46). On July 1, 1987, Mr. Barrett wrote to Zimmermann stating that the defense might offer "some proof as to Mr. Jones' psychiatric status...." (FEx. 72).

The prosecution was aware of the possibility of mental state defenses from other sources as well. In his internal memo to Assistant District Attorney Eddie Barnard, "Team Leader," dated March 24, 1987 (FEx.42), Zimmermann made such statements as: "The defendant is just plain weird" (Bates stamp p. 000678); "I have received a copy of a transcript of the defendant's first trial where he plead not guilty by reason of insanity" (Bates stamp p. 000679); and "The Scarface element will undoubtedly have to be dealt with in some way so that the jury doesn't think the guy is plain wacko" (Bates stamp p. 000681).

Notwithstanding all of this, the prosecution deliberately withheld and actively concealed exculpatory information relating to the Mr. Abdur'Rahman's mental state, including the 1972 transcript.

As indicated in his internal memo to Eddie Barnard (FEx. 42), at least as early as March 24, 1987, Zimmermann had the 1972 transcript in his file. (FEx. 131). This transcript indicated that Dr. A.M. Masri, a psychiatrist, examined the Mr. Abdur'Rahman and testified for the defense, concluding that he "is basically a schizoid human being.... [W]e consider this an illness.... [H]e is a sick man." (FEx. 131, Bates stamp 767). Dr. Masri testified that the Mr. Abdur'Rahman was mentally ill and that as a result of this mental illness, he was unable to control himself under times of stress. On cross examination, based in part on testing conducted on the Mr. Abdur'Rahman, Dr. Masri testified that the Mr. Abdur'Rahman had a mental disease which consisted of "delusional thinking and paranoid and schizoid personality and inability to withstand pressure and have [sic] no control." (FEx. 131, Bates stamp 771). Dr. Masri, as did Drs. Sadoff and McCoy before the District court, concluded that Mr. Abdur'Rahman suffered from "borderline personality with periodic decompensation with loss of control, of ego control." (FEx. 131, Bates stamp p. 773). Even the psychiatrist who testified for the prosecution in the

1972 case, Dr. Robert J. Eardley, testified that the Mr. Abdur'Rahman lost control under the stress of the moment and, when asked if the Mr. Abdur'Rahman had been temporarily insane at the time, testified that he did not know. (See FEx 131, Bates stamp p. 781). The record of the 1972 case clearly indicates that Mr. Abdur'Rahman's mental state is, at the least, an exculpatory subject of relevant inquiry and consideration.

Zimmermann could give no satisfactory explanation for his failure to turn over the 1972 transcript. (FT 1014-7). Basically, all that Zimmermann could say was, "I didn't see the two as proving -- as what happened in '72 as proving what happened in '86. That was just my interpretation." (FT 1017).[5] To be exculpatory, however, evidence does not have to "prove" what happened at the time of the offense. It is improper for the prosecutor to make his own judgment as to the force of the evidence in determining whether he must turn it over to the defense. Zimmermann found that the 1972 transcript was significant enough to make reference to it in his memo to Eddie Barnard where he evaluated the strengths and weaknesses of their case against the Mr. Abdur'Rahman. (FEx. 42, Bates stamp p. 000679). This was clearly exculpatory information, and there is no valid excuse or reason for the prosecution's decision to withhold this transcript from the defense.

The prosecution's decision to withhold the 1972 transcript radically altered the course of the case. Mr. Barrett gave the following testimony in this proceeding:

> Q. If you had had the transcript of the 1972 trial and you had been aware in the 1972 trial James Jones had raised an insanity defense and you had been aware even the prosecution's expert witness said he may have lost control at the time of the incident, would you have handled this case differently?
>
> A. I very well might have. You have to break down as to the guilt or innocence phase and the sentencing phase.
>
> Certainly this information would have some bearing on both the guilt or innocence phase and the sentencing phase.
>
> I believe that had I had this information that I would have certainly taken a much closer look at any potential psychiatric defense that might be available to Mr. Jones both at the guilt and innocence phase and certainly as mitigation at the sentencing phase.
>
> Q. Would you have gone to the judge for money for psychiatric services?
>
> A. Based upon what I see here, I believe I would have, sir, yes.

(FT 309).

Zimmermann's decision to withhold the 1972 transcript is made more egregious by the fact that Zimmermann had in his file a letter dated April 15, 1987 which he received from Magistrate David G. Lowe, the person who was the prosecuting attorney in the Mr. Abdur'Rahman's 1972 case. (FEx. 49). This letter was in response to Zimmermann's request for information about the 1972 prior murder conviction. This letter stated that the 1972 killing was a response to homosexual attacks on the Mr. Abdur'Rahman. This information would have corroborated the Mr. Abdur'Rahman's version of what happened in 1972; it would have mitigated the effect of the prior murder conviction; and if it had been disclosed to the defense, it likely would have kept Zimmermann from making misrepresentations to Mr. Barrett about the 1972 case, as discussed above.

The information Zimmermann possessed about the 1972 case was significant for two reasons: it mitigated the effect of the prior murder conviction, which the prosecution used as an

[5] Zimmermann's attempted explanation for failing to turn over the 1972 transcript is strikingly similar to the explanation he gave in Garrett v. State, 2001 Tenn.Crim.App.LEXIS 206 (2001), for his decision to withhold exculpatory evidence in that case. In Garrett, the Tennessee Court of Criminal Appeals reversed a first degree murder conviction based upon Zimmermann's deceit. The Court said, "This Court is extremely troubled with General Zimmerman's decision to himself determine the reliability of the evidence and to refuse to turn [it] over," and further found that Zimmermann had "intentionally withheld" information and had misled the defense. See Appendix C , pp. 3-4, hereto.

aggravator supporting their request for the death sentence; and, it established the existence of Mr. Abdur'Rahman's mental illnesses and emotional instability and the likelihood of the existence of viable mental state defenses to the 1986 offense. Zimmermann's decision to withhold this information from the defense (and from MTMHI) can be explained in only one way, especially when viewed in the context of the other instances of prosecutorial misconduct: this was part of his successful scheme to fraudulently mislead first the defense lawyers, MTMHI, and then the court and jury about the nature of the 1972 case and about Mr. Abdur'Rahman's mental condition and character.

(b) Police Reports On Mr. Abdur'Rahman's Condition at Time of Arrest.

The prosecution also withheld important information about Mr. Abdur'Rahman's mental state at the time of his arrest less than forty-eight (48) hours af. the offense. Detective Garafola had prepared a police report that described the Mr. Abdur'Rahman at the police station upon Mr. Abdur'Rahman's arrest in the afternoon of February 19, 1986. (FEx 7). This report described the Mr. Abdur'Rahman as crying and went on to say:

> "He then started to hit his head on the table and then he jumped up still handcuffed to the chair and banged his head up against the wall. We got him under control and then took him to the booking room. In the booking room he started to bang his head on the wall again. Det. Elmore was able to control him."

This report was not turned over to the defense as Brady material prior to trial. When the report was turned over to the defense as Jencks material in connection with Detective Garafola's testimony, this portion of the report was redacted.

Second, there was an Incident Report regarding an incident that took place at 21:40 (9:40 p.m). on February 19, 1986, just hours after the arrest. This report stated that the Mr. Abdur'Rahman again started "beating his head against the floor," and that he was taken to a padded

cell with instructions to an officer to check on him every half hour. The next Incident Report indicates that the Mr. Abdur'Rahman was not taken from the padded cell until two days later, on February 21, 1986, at 3:15 p.m. (FEx. 8). This collection of documents also was not turned over to the defense either before or during the trial.

This was not a case of mere non-disclosure. By redacting the first report of head banging, the prosecution actively concealed this information from the defense. This was important information. According to the testimony in this case by Dr. Craddock of MTMHI, the State's mental health expert, headbanging is an "extremely unusual behavior" for adults with normal intelligence, (FT 125), and this kind of self-mutilating behavior is a possible sign of mental health problems such as Borderline Personality Disorder. (FT 130-2).

By deciding to withhold this information, the prosecution created for themselves the opportunity to falsely argue to the jury that Mr. Abdur'Rahman showed no emotion, was neither mentally ill nor emotionally unstable, but instead was just a depraved murderer who committed the act out of pure pleasure and enjoyment. If this information had been disclosed, the prosecution would not have been in a position to make these kinds of false and misleading arguments with any effect.

(c) Transcript of Miller's First Statement to Police.

The prosecution also failed to turn over to the defense prior to trial, as Brady material, the transcript of the April 23, 1987 tape recorded interview conducted by the prosecution of the co-defendant Devalle Miller. (FEx. 51). This transcript contains descriptions by Miller of the Mr.

Abdur'Rahman that suggest a possible mental state defense.[6] For example, Devalle Miller gave the following descriptions in his statement:

> "... and I was standing there and its like James went from day to night." (Bates stamp p. 000166).
>
> "...he was babbling on and on and on..." (Bates stamp p. 000167).
>
> "... because I was riding a uh uh to what I perceived as a maniac." (Bates stamp p. 171).
>
> "I really didn't want him in my house for the simple fact I didn't know if he was going to turn himself on back in my house with me and my family ..." (Bates stamp p. 000173).

The prosecutors themselves explicitly acknowledged that Devalle Miller's statements might raise a question about the Mr. Abdur'Rahman's mental health. In the margin of the transcript next to Miller's statement about how he perceived the Mr. Abdur'Rahman as a "maniac" (Bates stamp p. 000171), ADA Eddie Barnard had handwritten the comment: "Insanity + mitigating factor."

Although the prosecution did turn over this transcript as Jencks material during the course of the trial, that did not satisfy the prosecution's obligation under Brady. Exculpatory information about a defendant's mental state must be turned over sufficiently in advance of the trial to enable the defense to consider the defendant's potential guilt and sentencing stage defenses, to take steps to obtain a professional evaluation, and to prepare the case for trial.

(d) Miller's Statements to Prosecution about the SGM.

As discussed below, the prosecution spent hours with Miller preparing him to testify. From the testimony given by Miller in Miller's own sentencing hearing (FEx. 93) and in Mr. Abdur'Rahman's state post-conviction hearing (P-CT, Vol. III, pp. 13-43), it is now apparent

[6] This transcript was exculpatory for two reasons: (i) as discussed in this part of this Brief, it contained exculpatory information relevant to the Mr. Abdur'Rahman's mental state; and (ii) as explained below, it contained statements that contradicted Devalle Miller's trial testimony.

that Miller gave the prosecution at least the following information concerning the SGM and its involvement in the offense:

- that Miller and Mr. Abdur'Rahman joined the SGM, a racial identity religious organization devoted to bettering the Black community (P-CT, Vol. III, at 15);
- that Miller and Mr. Abdur'Rahman were "brainwashed" by the organization (Id. at 37);
- that there was a paramilitary group within the SGM that consisted of Allen Boyd, William Beard, Miller and Mr. Abdur'Rahman (Id. at 15);
- that Miller and Mr. Abdur'Rahman went to Daniels' apartment on the evening of the offense as part of an SGM mission to intimidate Daniels into ceasing his drug selling activities, which was part of the SGM's larger mission to rid the community of drug dealing (Id. at 19);
- that William Beard gave Miller a pistol to be used in "operations to clean up the Black neighborhoods (Id. at 16);
- that Mr. Abdur'Rahman told Miller that he, Mr. Abdur'Rahman, got his shotgun from Allen Boyd (Id. at 17);[7]
- that on the night of the killing, after leaving Daniels' house, Miller and Mr. Abdur'Rahman went to Miller's apartment and Mr. Abdur'Rahman made a telephone call from a booth; and Allen Boyd showed up a short time later (Id. at 26);
- that after leaving the victims' apartment, Miller heard Boyd say something to the effect of "just be cool and go back to work." (Id. at 28);
- that after Mr. Abdur'Rahman's arrest, Miller went to Beard who gave him getaway money (Id. at 29-31);
- that Miller intentionally misled Beard as to where he was going because he feared that Beard, Boyd and the SGM might kill him; Miller also told others while on the run that he was fearful of Boyd, Beard and Mitchell Hollie, all of the SGM (Id. at 31, 36-7); and wife, Karen, with financial assistance while Miller was on the run. (Id. at 35-6).

[7] The fact that Mr. Abdur'Rahman obtained his gun from Boyd was verified from the F.B.I. gun trace introduced into evidence in the District court proceeding. See *Motion to Expand Record* and *Order* entered April 8, 1998 (Docket Nos. 202, 204).

- that members of the SGM provided Miller's wife, Karen, with financial assistance while Miller was on the run. (Id. at 35-6).

Miller confirmed in his post-conviction testimony that he related all of this information to Zimmermann; and Zimmermann never disputed this either during his very brief cross-examination of Miller or elsewhere. (Id. at 33-5).

By deciding to withhold this Brady information from the defense, the prosecution created for themselves the opportunity to falsely portray Mr. Abdur'Rahman as the sole planner and decision-maker relating to the events surrounding the offense, and to "debunk" any effort by Mr. Abdur'Rahman to mention the SGM during his sentencing hearing.

(e) Lab Reports about Blood Evidence.

This Court previously considered the merits of Mr. Abdur'Rahman's Brady claim relating to the T.B.I. lab report which found that no blood was found on clothing seized from Mr. Abdur'Rahman's apartment, including Mr. Abdur'Rahman's long dark wool coat. This Court rejected this Brady claim on the ground that the lab report had been provided to Mr. Abdur'Rahman's first counsel, Mr. Neal McAlpin and had been filed with the trial court. 999 F.Supp. at 1090.

Although this Court has rejected this Brady claim, Zimmermann's conduct around the blood evidence was deceptive and further evidences both the prosecution's persistent and deliberate

scheme to deceive and the prejudicial effect of that scheme, especially when viewed cumulatively with the ineffective assistance of Mr. Abdur'Rahman's trial counsel.

Zimmermann was fully aware of the significance of the lab report. In his internal memo to Assistant District Attorney Eddie Barnard, Zimmermann identified the lab report as a "weakness in [the] case" as follows:

> T.B.I. Lab Report was unable to find any blood staining on the long wool coat worn by Jones. Photographs of the decedent's house show blood spattering all over the kitchen....[I]f the defendant did wear his coat the entire time he obviously was not present when the stabbing occurred. Also, the police seized a pair of work pants during the search of the defendant's apartment which had red spots all over it which was found not to contain any human blood stain. The red particles on the defendant's pants came from red dye used at the publishing Board where the defendant worked.

(FEx 42 at Bates stamp p. 677). The police reports describing the crime scene, which were never turned over to the defense, also described the extensive blood splattering.

This "weakness" in the prosecution's case was confirmed by the evidence introduced before the District court. Zimmermann testified, "I think when you have a murder with this much splatter, you would think some would have gotten on the defendant, yes." (FT 917). Dr. Kris Sperry, the Medical Examiner for the State of Georgia, also testified before the District court that, based on his review of the autopsy report, the T.B.I. file, and the blood evidence, the assailant would have had blood stains on his clothes. Dr. Sperry also testified that the blood stains would not have been removed by cleaning or washing and would have been detected by the tests employed by the T.B.I.. (FT 38-61).

Although the prosecution may have provided the T.B.I. lab report to Mr. McAlpin, Mr. Abdur'Rahman's original counsel, Zimmermann deceptively managed to keep the lab report out

of Mr. Barrett's view. Prior to the trial Mr. Barrett filed with the court and served on the prosecutor a request for all exculpatory information. (FEx 63). The prosecution responded to this request by turning over to Mr. Barrett the results of the comparison tests of Mr. Abdur'Rahman's clothing to crime scene soil samples (FEx 62), which were of no exculpatory significance because Mr. Abdur'Rahman had always conceded that he was at the crime scene. But Zimmermann withheld the T.B.I. lab report. Further, in a letter from Zimmermann to Mr. Barrett dated March 30, 1987, in response to Mr. Barrett's "form discovery request," Zimmermann responded only to a specific Brady request for the identity of "other subjects or suspects that may be involved." (FEx 41, 46). Again, Zimmermann never notified Mr. Barrett about the exculpatory blood evidence. Whether or not these actions amount to a specific Brady violation, Zimmermann's conduct through this period prior to trial was not forthright and certainly was inconsistent with the prosecutor's duty to seek justice.

Zimmermann's ploy worked. Barrett never became aware of the T.B.I. lab report and therefore never raised any question at trial about the blood evidence.

As a consequence, Zimmermann was free to falsely use Mr. Abdur'Rahman's long dark wool coat at trial to help satisfy his need to identify Mr. Abdur'Rahman as the assailant, even though this coat tested negative for blood. Both of the prosecution's key witnesses at the trial testified that Mr. Abdur'Rahman was wearing his long black wool coat throughout the time period when the offense occurred. The prosecution introduced the coat into evidence during Norma Norman's testimony. (T 1333, trial exhibit 12). On at least five separate occasions during her testimony, she described Mr. Abdur'Rahman as wearing the "long black coat." (T 1332, 1334, 1343, 1364, 1366-7). The co-defendant Devalle Miller, on at least two separate occasions during his testimony, described Mr. Abdur'Rahman as wearing the coat during the

time of the offense, and he too identified trial exhibit 12 as the coat Mr. Abdur'Rahman was wearing. (T 1451, 1454-5). During the guilt stage closing argument, the prosecution displayed the coat to the jury, repeatedly describing it as the "gangster coat" that Mr. Abdur'Rahman wore at the time of the offense. (T 1672-3). Significantly, although the prosecution was aware of the weakness in their case from the lack of blood stains on the coat, and although as explained below they spent long hours on several occasions preparing (manipulating) Miller for his testimony, no one ever indicated that Mr. Abdur'Rahman ever took the coat off at any time while the offense occurred.[8]

(f) Other Police Reports.

Several other police reports were not turned over to the defense even though they contained exculpatory information. (FEx. 1-8, 9). Among other things, these police reports indicate that: blood was splattered on the walls of Daniels' apartment, which is exculpatory information relating to the question whether Mr. Abdur'Rahman actually performed the stabbings; "The chest of drawers in [the master bedroom] had not been opened. It did not appear that the room had been searched by anyone," which is exculpatory information relating to the question of whether Mr. Abdur'Rahman took the $300, which Norman had testified was taken from that location; and that when the first officers arrived at the scene, there were a number of people who had already been in the apartment, which is exculpatory evidence raising a question about whether, if $300 was stolen, Mr. Abdur'Rahman was the one who took the money. (See discussion below on the prosecution's manipulation of Norman's testimony on this point.)

[8] The failure to present the blood evidence was prejudicial to Mr. Abdur'Rahman at both the guilt and sentencing stages. At guilt, it would have raised at least reasonable doubt about whether Mr. Abdur'Rahman was the assailant and therefore whether he was guilty of premeditated murder. For the same reasons, at sentencing it would have raised at least "residual doubt" about whether he was the assailant, which is a mitigating factor to be considered by the jury. State v. Teague, 897 S.W.2d 248, 256

(3) **Altering Testimony**.

(a) **Miller's Testimony**.

There were clear and obvious inconsistencies between Miller's April 23 statement (FEx. 51) and Miller's trial testimony. The circumstances of this case demonstrate that the prosecution improperly manipulated Miller's testimony to conform to the false picture the prosecution presented to the jury.

Brady requires the prosecution to disclose information that could be used to impeach the credibility of the prosecution's witness. In this case, the prosecution violated Brady by failing to disclose to the defense, prior to trial, the fact that Devalle Miller changed his story to the prosecution, and that his trial testimony would contradict in many material respects the statements he previously gave to the prosecution.

It goes without saying that in a case of this sort, the credibility of a co-defendant's testimony will be suspect. As Zimmermann said, "[W]hen you have co-defendants they always want to point the finger at each other." (FT 912).

Because of the problems with the blood evidence and the lack of other evidence that might establish the Mr. Abdur'Rahman as the assailant, the prosecution realized that Miller was a crucial witness to them. The prosecution, therefore, worked on Miller intensively.

They took advantage of the one day Miller was in Tennessee unrepresented by counsel, April 23, 1987, to interview him. See Ross Alderman's testimony (FT 1026-30). Zimmermann testified before the District court that he would not interview somebody charged with murder if they are unrepresented by counsel unless they "execute a waiver of counsel." (FT 934). Yet, there is no indication that Miller executed a waiver of counsel when the prosecution interviewed him on that

(Tenn. 1995); State v. Hartman, 42 S.W.3d 44 (Tenn. 2001). The jury affidavits in this case demonstrate that the blood evidence is a powerful mitigating factor.

day. The following day Miller was appointed counsel when he appeared for the first time in court on the jail docket and he was represented continuously thereafter.

Subsequently, the prosecution was advised that Miller's story had changed. Miller's attorney, Ross Alderman, told Zimmermann that there were discrepancies between Miller's version of what happened as compared to the version Miller set forth in his April 23 interview. (FT 1033). The prosecution then decided to spend time with Miller. Zimmermann testified before the Federal District Court that if he had to interview a co-defendant witness more than once or twice, it would be "because, in my opinion, I am trying to find additional evidence, other leads, things to corroborate their testimony." (FT 938). It is clear from the facts of this case, however, that Zimmermann did more with Miller than pursue additional evidence or other leads. He coached Miller to shape his testimony. (See, e.g., FT 1037).

Consequently, the prosecution met with Miller to prepare his testimony. Zimmermann testified before the District court that he could "only remember one time where we had what I would call a pretrial preparation meeting." (FT 938). In fact, according to Mr. Alderman's testimony, in addition to the April 23 interview and the mid-June meeting, the prosecution also met with Miller on July 6 for 3.4 hours, July 7 for 3.5 hours, July 9 for 3.6 hours, and July 12 for 2.5 hours, for a total of 13 hours during the days immediately preceding the guilt stage of the trial where Miller testified. (FT 1034-8). Mr. Alderman testified that it seemed as if Zimmermann was spending a "long time" preparing Miller to testify. (FT 1036-7). During those meetings Zimmermann explained to Miller what other witnesses were going to say. (Id.) Mr. Alderman further testified in this proceeding that there were significant discrepancies between the version of the facts described by Miller in these meetings and the version he gave in his April 23 statement. (Id.) Also during these interviews Miller told Zimmermann about the SGM. (FT

1038-40). He described the group as a paramilitary arm of the Gospel Ministry which had a plan to drive drug dealers out of the community. (FT 1039). He identified the leaders of this group as Boyd, Beard and Hollie, and he expressed concern or fear of what others might do to him if he testified. (FT 1040). Zimmermann never disclosed before trial the fact that Miller had changed his story or any of the information Zimmermann acquired during the course of his interviews of Miller.[9]

(b) Norman's Testimony.

The indictment against Mr. Abdur'Rahman included a count charging that Mr. Abdur'Rahman "did steal, take and carry away from the person and against the will of Patrick Daniels, certain personal property, to wit, approximately three hundred dollars ..." (T. 1270-1). In addition to seeking a conviction against Mr. Abdur'Rahman on this charge, the prosecution also included this charge as one of the aggravating circumstances supporting their request for the death penalty. There was, however, no evidence that anyone took any money from Patrick Daniels. At the time of trial, there was only a suggestion that money may have been stolen from Norma Norman, and not from "the person of Patrick Daniels."

[9] To induce Miller to give the testimony the prosecution was looking for, the prosecution offered Miller a deal. Miller was charged along with the Mr. Abdur'Rahman with capital first degree murder, assault with intent to commit murder in the first degree with bodily injury, and armed robbery. (FEx. 44). In exchange for his testimony, the prosecution offered a plea bargain that would reduce the original three charges to the two reduced charges of second degree murder and armed robbery. (FEx. 92; Alderman testimony, FT 1041-3). Instead of a possible death sentence or life sentence, the reduced charges would carry sentences ranging from 10 to 35 years with the possibility of earlier parole. (FT 1044; FEx. 93).

The defense requested the terms of any settlement agreement between the State and any witness in return for the witness's testimony. (FEx. 42, Discovery Requests, ¶ 12). Prior to the trial the prosecution filed a RESPONSE TO MOTION FOR EXCULPATORY MATERIAL REGARDING PROMISES TO STATE'S WITNESSES, in which the prosecution purported to set forth the terms of its agreement with Miller. (FEx. 67). This Response disclosed only that the prosecution had agreed not to seek the death penalty. This Response failed to disclose that the prosecution had also agreed to a plea to reduced charges that would limit the length of any prison sentence Miller might receive. By failing to disclose all of the terms of the plea agreement that were favorable to Miller to induce his testimony, the State violated the Mr. Abdur'Rahman's due process rights under Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104.

To get around this problem, the prosecution determined to manipulate Norman's testimony by asking falsely misleading questions. In their trial notes, the prosecutors wrote with regard to this matter, "Items taken - $300 cash and anytime teller card (leading questions to make her say it was theirs)," and "$300 and anytime teller card (leading question to say cash was theirs)." (FEx. 77).

The leading questions by the prosecution worked, for Norman gave the desired response to the leading questions. (See T. 1390). Through their improper use of false leading questions, the prosecution managed to conform Norman's testimony to the indictment.

In this context, it should be further pointed out that a careful reading of Norman's testimony establishes either that the $300 never existed or, if it did, Mr. Abdur'Rahman was not the person who took it. Earlier, Norman testified that the $300 was in the chest of drawers in the bedroom. (T. 1389). She offered no testimony that Mr. Abdur'Rahman or Miller ever went into this bedroom. Her only testimony on the alleged "theft" of the money was:

> Q. Was the [$300] there when they left?
>
> A. Not that I know of.
>
> Q. Did they take it?
>
> A. Not that I know of.

(T. 1390). Notwithstanding this testimony, and the absence of any other proof on the subject, Zimmermann proceeded to falsely argue at closing that Mr. Abdur'Rahman "was the only one that went through the bedroom.... Ms. Norman said, he went and rummaged through the room." (T. 1669).

This represents but one more example of the ineffective assistance of Mr. Abdur'Rahman's trial counsel, Zimmermann's unethical opportunism in taking advantage of defense counsel's failings, and the resulting false picture that was presented to the jury.

(4) Inadmissible Information to the Jury.

This claim was presented to the Tennessee Supreme Court on the direct appeal where it was held that the prosecution had, in fact, acted improperly. This Court found that this constituted prosecutorial misconduct. Describing Zimmermann's behavior, this Court found:

> Defendant made a motion in limine prior to the sentencing hearing to prohibit any mention at the hearing that defendant was on parole at the time of the offense. In the course of arguing the motion the State's attorney stated he would not pass the records of defendant's prior murder conviction to the jury since they showed that defendant had received a life sentence and described the circumstances of the crime. Defendant's parole officer, who was identified only as an employee of the U.S. District Court in Nashville, testified to introduce the fact of defendant's two prior convictions for second degree murder and assault with a deadly weapon. The State was allowed over defense objection to ask the nature of the deadly weapon. The witness answered that it was a knife. The State's attorney then passed to the jury the record of defendant's conviction for assault with a deadly weapon which included a two-count indictment charging him with robbery in addition to the assault. Defense counsel raised an objection on the basis that the information it contained was irrelevant and requested the court to instruct the jury that the only information contained in the record which was applicable was the fact of the conviction. The trial judge gave the instruction requested.
>
> The defense objection was appropriate. The conduct of the State's attorney **bordered on deception** by which he was able to get before the jury information which was not evidence in the case they had under consideration. The action of the State was **improper**.

State v. Jones, 789 S.W.2d 545, 551-2 (Tenn.1990).[10]

[10] In the direct appeal, of course, this was the only prosecutorial misconduct claim presented to the Tennessee Supreme Court. This misconduct obviously represents only a fraction of the total body of prosecutorial misconduct that was later discovered during collateral litigation.

C. Effect of Prosecutorial Misconduct: False Picture of the Case.

The prosecution's persistent pattern of fraud and deception combined with the ineffective assistance of defense counsel, presented the jury with a completely false picture of every aspect of this case. Among other things, the jury was given a false picture of: (i) the Mr. Abdur'Rahman as a person; (ii) the nature of the prior 1972 conviction; (iii) the circumstances surrounding the offense including Mr. Abdur'Rahman's motivation and the identity of the assailant; and (iv) Mr. Abdur'Rahman's attitude towards the offense.

In other words, this is not merely a case where the jury failed to hear everything that it should have heard. This is a case where what the jury did hear was patently false, misleading and grossly prejudicial.

(1) False Picture of the Mr. Abdur'Rahman as a Person.

The effect of obfuscating the blood evidence, misrepresenting to MTMHI and defense counsel the circumstances surrounding Mr. Abdur'Rahman's prior murder conviction, and withholding evidence on these matters, was to paint a false and misleading picture of Mr. Abdur'Rahman as a person.

The defense was oblivious to the fact that Mr. Abdur'Rahman's coat tested negative for blood stains and to the significance of any of the blood evidence in the case (especially in light of the withheld police reports describing the extent of blood splattering at the scene of the offense). The prosecution took advantage of defense counsel's oblivion by using the coat to graphically mischaracterize Mr. Abdur'Rahman as merely a drug stealing "gangster." Throughout the trial the prosecution relied upon the coat as the item of clothing Mr. Abdur'Rahman wore during the offense and referred to it as the "gangster coat."

In the trial, the prosecution introduced Mr. Abdur'Rahman's coat as Exhibit 12 (T. 1333) and elicited the following testimony from Norma Norman:

> A. ...Mr. Jones had on this **long black coat**,...

(T. 1332).

> Q. Anything about that coat cause you any concern?
>
> A. First thing I thought, it was a **gangster coat**.
>
> Q. A **gangster coat**?
>
> A. Yes.

(T. 1334).

> A. And Mr. Jones walks in [to the apartment] and he had on this **long black coat**.
>
> Q. Same coat that you described for the ladies and gentlemen of the jury?
>
> A. Right."

(T. 1343).

The prosecution then referred to the "gangster coat" in their guilt stage closing argument:

> He had a **gangster coat** on, is what she called it – a **gangster coat**. And she noticed that. Now, I don't know what you call a **gangster coat**, but that is what she saw **(indicating exhibit)**, and she remembered it. **And he wore it that night**.

(T. 1672-3).

> Listen to this, ladies and gentlemen, the man, the next night, when he goes over there and he says we're going to stab these people, he goes by his house, and what does he do, he changes into his **gangster uniform**.

(T. 1673).

If the blood evidence had been disclosed in a forthright manner, and if the defense had properly evaluated that evidence, the prosecution would have been unable to use the coat in this manner to wrongfully characterize Mr. Abdur'Rahman as a "gangster." Zimmermann was well aware that the victim's blood was not on the coat and, as pointed out above, in an internal memo he specifically referred to that fact as a weakness in the case. (FEx. 42, Bates stamp 000678). It was therefore a deceit for him to display the coat to the jury, representing that Mr. Abdur'Rahman wore the coat that evening, while at the same time withholding the information that the coat had tested negative for blood stains.

(2) <u>False Portrayal of 1972 Conviction</u>.

The prosecution also took advantage of the effect of their misconduct to mischaracterize Mr. Abdur'Rahman's prior murder as a premeditated, deliberate murder, contrary to all of the evidence in the 1972 case.

> Because you see, he had faced this jury before; not you, but he had faced a jury before and heard the very same thing before, when he murdered someone else, **willfully, deliberately with malice aforethought**.

(Sentencing stage closing argument, T. 1979).

> Ladies and gentlemen, he was a murderer, and he was a murderer before he ever got in that group – just a low down murderer, no morals – no morals.

(Sentencing stage closing argument, T. 1982).

If the prosecution had refrained from misrepresenting the circumstances surrounding the 1972 conviction and had disclosed the exculpatory evidence in their files about the 1972 case, and if Mr. Abdur'Rahman's counsel had properly investigated the 1972 case, then this false characterization never would have been presented to the jury. Instead, the jury would have been told the truth: that the 1972 murder was an emotionally charged response by a mentally ill

person to repeated homosexual rape in prison and, that under the Tennessee definition of insanity at least, Mr. Abdur'Rahman probably was insane at the time of that offense. The prosecution never would have gotten away with mischaracterizing the 1972 murder in a prejudicial way as a "deliberate" murder.

(3) False Picture of the Circumstances Surrounding the 1986 Offense.

By failing to turn over Brady material regarding Miller's prior statements to the prosecution and information about the SGM, and by improperly manipulating Miller to give false and misleading testimony, the prosecution created the situation where they could deliberately misrepresent to the jury the circumstances surrounding the offense in this case. Although Mr. Abdur'Rahman and Miller went to Daniels' apartment as part of a mission organized by the SGM (including Allen Boyd and William Beard) with the altruistic (albeit misguided) purpose of ridding the community of drugs, the prosecution mischaracterized the offense as a pure drug robbery entirely designed and led by Mr. Abdur'Rahman.

The prosecution began the mischaracterization of the offense in their guilt stage opening statement:

> And later that evening the defendant told Mr. Miller that he knew of a guy that they can roll, that they could rob, that they could gangster him and steal his drugs.

(T. 1275).

The prosecution, through Miller's manipulated testimony, further characterized the offense as a drug robbery without any reference to the SGM or the motives behind the event:

> A little bit later on he had pulled me off to the side and he said, you know, this little punk over here that I got this from has got some pretty good reefer, you know, I think we can probably go over there and ... He told me that he had got some good weed from the guy. The guy had some good weed. And he had reason to believe that he had more. And he said that the guy was a little

> punk and we could probably go gangster him.... To me that meant, going, taking his dope, his marijuana – rousting him up and, you know, taking his --- [Robbing him?] Yes.

(T. 1449-50).

Also through Miller's manipulated testimony, the prosecution characterized the "plan" as entirely Mr. Abdur'Rahman's, again without reference to the SGM:

> Q. Did you agree to that plan?
>
> A. Yes, I did.
>
> Q. Whose plan was it?
>
> A. It was the defendant's.

(T. 1451).

This false characterization was carried into the prosecution's guilt stage closing argument where the prosecution misrepresented to the jury:

> And who was the leader of this whole thing? Who gave all the orders? Who gave all of the commands?" [Referring to Mr. Abdur'Rahman.]

(T. 1706).

The multiple instances of prosecutorial misconduct finally enabled the prosecution, in the sentencing stage closing argument, to discredit as "bunk" any notion that the SGM was involved, even though the prosecution was told about the SGM's involvement:

> [H]e [the Mr. Abdur'Rahman] knows that that story about being a religious cause will be rejected by you as bunk.

(T. 1982-3).

If the prosecution had honored their Brady obligation by turning over to the defense prior to trial the statements made to them by Miller and the information they had received about the

SGM, and if defense counsel had properly investigated this case, the prosecution never would have been in a position to paint this kind of false and prejudicial picture to the jury.

(4) False Picture of Mr. Abdur'Rahman's Attitude Towards the Offense.

By deliberately making misrepresentations to MTMHI and to defense counsel regarding Mr. Abdur'Rahman's prior 1972 murder conviction, and by withholding Brady material regarding both the prior conviction and the other signs of Mr. Abdur'Rahman's mental illnesses and emotional instability, the prosecution was able to invent for the jury the prosecution's own false picture of Mr. Abdur'Rahman as a "depraved killer" who had no psychological or emotional problems.

The prosecution repeatedly misrepresented to the jury that Mr. Abdur'Rahman had no emotional or psychological problems and therefore was just a "depraved" completely immoral person, which clearly is not the case. The prosecution established this false theme at the outset of the sentencing hearing:

> [I]t showed the depraved mind the defendant really has. Not a sick mind. **Not so sick of a mind that he is mentally ill**, just depraved – just depraved.

(Sentencing stage opening statement, T. 1805).

This theme was carried through to the sentencing stage closing argument:

> That's because, ladies and gentlemen, you're looking at a depraved man, **not someone suffering from severe extreme emotional disturbance**, a depraved man.

(Sentencing stage closing argument, T. 1981).

> [N]ow, he [defense counsel] voir dired you on, would you believe a psychiatrist, or a psychiatric examination or whatever, about **extreme emotional disturbance or whatever? There is none of that here today**.

(Sentencing stage closing argument, T. 1981-2).[11]

Because the prosecution's pattern of misconduct, combined with the ineffectiveness of defense counsel, allowed the prosecution to falsely portray Mr. Abdur'Rahman as being a person without mental illness or emotional disturbance, the prosecution created a situation where it could falsely claim in a highly prejudicial manner that Mr. Abdur'Rahman killed for "pure pleasure" and "enjoyment". The prosecution struck this theme in the guilt stage of the case and carried over to the sentencing stage through effective repetition:

> Whoever did that, ladies and gentlemen, **enjoyed it**, had to have.

(Guilt stage closing argument, T. 1679).

> It was all part of the **enjoyment** that person who did the stabbing had.

(Guilt stage closing argument, T. 1711).

> Is there any reason, is there any justification why he took the life of Patrick Daniels? Is there any? None, except **pure pleasure**.

[11] In fact, there is abundant and irrefutable evidence that Mr. Abdur'Rahman suffers from mental illness and that he had mental state guilt stage defenses available to him at the time of his trial. Mr. Abdur'Rahman has a long documented history of displaying symptoms of mental illness, of being institutionalized for and receiving diagnoses of mental illness, and of being administered powerful antipsychotic and other medications for mental illness. See Social History (FEx. 141). As pointed out elsewhere, in Mr. Abdur'Rahman's 1972 trial Dr. Masri, a psychiatrist, gave Mr. Abdur'Rahman a borderline personality diagnosis and testified further that Mr. Abdur'Rahman "decompensates" when under stress – an evaluation similar to Dr. Sadoff's evaluation presented to the District court. Even the psychiatrist who testified for the prosecution in the 1972 case, Dr. Robert J. Eardley, testified that the Mr. Abdur'Rahman lost control under the stress of the moment and, when asked if the Mr. Abdur'Rahman had been temporarily insane at the time, testified that he did not know. (See FEx. 131, Bates stamp p. 781). In Mr. Abdur'Rahman's state post-conviction hearing, Dr. Nurcombe, a psychiatrist, similarly diagnosed Mr. Abdur'Rahman with Post-Traumatic Stress Disorder. Dr. Nurcombe's testimony went unchallenged by the state. In this habeas proceeding, both Dr. Sadoff and Dr. McCoy diagnosed Mr. Abdur'Rahman with mental illnesses. Although Dr. Craddock of MTMHI did not give Mr. Abdur'Rahman a diagnosis, he admitted that he did not have access to Mr. Abdur'Rahman's social history, and he acknowledged many of the symptoms of Mr. Abdur'Rahman's mental illness. (FT. 130-2). Dr. Craddock, therefore, testified before the District court that he "would not take issue" with a diagnosis of Borderline Personality Disorder for Mr. Abdur'Rahman. (FT. 140). Dr. Craddock acknowledged that persons with this kind of disorder can suffer dissociative and psychotic episodes. (FT. 129, 132: "That is what borderline personality disorder means. The borderline of becoming psychotic.") Dr. Craddock also admitted that he never reached an opinion on whether or not Mr. Abdur'Rahman had a diminished capacity mental state guilt stage defense, or whether or not Mr. Abdur'Rahman's mental condition might be a mitigating factor at sentencing. (FT. 142-3).

(Sentencing stage closing argument, T. 1942).

> Ladies and gentlemen, as a man thinketh in his heart, so is he. And you saw the real James Jones in the picture. And now, when you saw those convictions, you know that's the real James Jones because that's how he is. and when he comes here from Chicago, he is not here two years before a vicious brutal murder at his hands – at his planning – **at his enjoyment** – and that's depraved.

(Sentencing stage closing argument, T. 1984-5).

The net effect of the prosecutorial misconduct together with the ineffective assistance of counsel, therefore, was to falsely paint Mr. Abdur'Rahman as the ideal candidate for a guilty verdict for premeditated murder and the death sentence: a cool-minded "depraved" "gangster" with "no morals" and free of any mental illness or emotional disturbance who singularly planned and led a drug robbery, designed purely for personal gain, and in the course of that robbery killed for pure pleasure and enjoyment. As the abundant and compelling evidence in this habeas proceeding shows, however, Mr. Abdur'Rahman is not that type of person, the SGM was deeply involved in directing Mr. Abdur'Rahman's actions, and the true circumstances surrounding the offense are entirely different from what the prosecution falsely portrayed to the jury. As the jury affidavits demonstrate, and as should be clear from the face of the record after considering the cumulative effect of all the errors in this case, if the jury had been presented with the true picture of Mr. Abdur'Rahman and the circumstances surrounding the offense, the result of the trial would have been completely different.

STATE v. ABU-ALI ABDUR'RAHMAN (formerly James Lee Jones)

COURT REPRIMANDS OF ZIMMERMANN

In a string of court opinions over the course of Zimmermann's career as a prosecutor (including opinions in Abu-Ali's case), the courts have repeatedly reprimanded Zimmermann for various legal and disciplinary violations. These reprimands demonstrate certain persistent patterns:

(i) Zimmermann's pattern of withholding exculpatory evidence;

(ii) Zimmermann's pattern of "misleading" defense counsel and the court; and

(iii) Zimmermann's pattern of knowingly violating court rulings relating to inadmissibility of evidence and improper jury argument.

Some of these court opinions are listed below:

1. In the direct appeal of Abu-Ali's case from the trial court to the Tennessee Supreme Court, Zimmermann was reprimanded by the Tennessee Supreme Court for handing inadmissible material to the jury during Abu-Ali's sentencing hearing. The Tennessee Supreme Court said:

> Defendant made a motion in limine prior to the sentencing hearing to prohibit any mention at the hearing that defendant was on parole at the time of the offense. In the course of arguing the motion the State's attorney stated he would not pass the records of defendant's prior murder conviction to the jury since they showed that defendant had received a life sentence and described the circumstances of the crime. .... The State's attorney then passed to the jury the record of defendant's conviction for assault with a deadly weapon which included a two-count indictment charging him with robbery in addition to the assault. Defense counsel raised an objection on the basis that the information it contained was irrelevant and requested the court to instruct the jury that the only information contained in the record which was applicable was the fact of the conviction. The trial judge gave the instruction requested.
>
> The defense objection was appropriate. The conduct of the State's attorney **bordered on deception** by which he was able to get before the jury information which was not evidence in the case they had under consideration. **The action of the State was improper**.

State v. Jones, 789 S.W.2d 545, 551-2 (Tenn. 1990). The Tennessee Supreme Court held, however, that this prosecutorial misconduct was "harmless," and therefore denied this claim as a basis for reversing the death sentence.

2. In the federal district court habeas proceeding, Judge Campbell held that Zimmermann committed a Brady violation by failing to turn over to Abu-Ali's trial counsel the transcript of Abu-Ali's prior (1972) murder trial. This transcript contained testimony of two

psychiatrists, one for the defense and the other for the prosecution, which described aspects of Abu-Ali's mental illnesses and would have supported an insanity defense under Tennessee's definition of insanity. Although Judge Campbell found that Zimmermann had violated his Brady obligation to turn over this exculpatory evidence, Judge Campbell also found that, "standing alone," this instance of prosecutorial misconduct did not "undermine[s] confidence in the outcome of the sentencing hearing," and therefore he rejected this claim as a basis for awarding Abu-Ali relief. Abu-Ali Abdur'Rahman v. Bell, 999 F.Supp. 1073, 1089-90 (M.D.Tenn. 1998). Judge Campbell, however, did grant relief on grounds of ineffective assistance of counsel.

4. In In re Zimmerman, 1986 WL 8586 (Tenn.Crim.App. 1986), Zimmerman was held in contempt of court for violating Rule 16, Tenn.R.Crim.P., which is the rule requiring the prosecution to disclose certain types of evidence to the defense prior to trial. Zimmermann argued that his noncompliance with Rule 16 "was clearly made through oversight" (his words) and was not "willful." The Court of Criminal Appeals said that this was not an excuse and characterized Zimmermann's actions as an **"abuse of, or unlawful interference with, the process or proceedings of the court."**

5. In Zimmermann v. Board of Professional Responsibility, 764 S.W.2d 757 (1989), Zimmermann was sanctioned for making inappropriate comments to the press in violation of the disciplinary rules. The court rejected his argument that his comments were protected by the First Amendment.

6. According to a Tennessean article published May 30, 1998, in the case of State v. Vukelich Zimmermann was chastised by Davidson County Circuit Court Judge Gayden for "misleading" the court into improperly issuing a seizure order for the seizure of a $102,000 investment account owned by the defendant and his wife which allegedly contained the proceeds of drug sales. According to the article:

> Circuit Judge Hamilton Gayden testified that he should not have signed the original seizure order March 13. Gayden said that, "upon reflection," he believes Zimmermann and Metro Drug investigator Ed Rigsby did not present enough evidence about the source of the funds to justify seizing them as the fruits of illegal drug dealing...The judge testified that **Zimmermann and Rigsby misled him into believing** that the money in the mutual fund account came from illegal activity."

Judge Gayden set aside the seizure order and directed that the investment account be returned to the Vukelichs.

7. In State v. Middlebrooks, 995 S.W.2d 550 (1999), a death penalty case, Zimmermann was reprimanded for making two kinds of improper closing arguments to the jury at the conclusion of capital sentencing hearing. First, the court found that Zimmermann's "victim impact" argument was improper:

> [T]he prosecutor's statement, "his family asks you to impose the death penalty," was improper. Although evidence to this effect was not introduced during the sentencing hearing, and would have been inadmissible, the prosecutor's statement clearly is an improper characterization of the family's view as to the appropriate sentence.

Id. at 558. Secondly, the court found that Zimmermann's biblical references during closing argument (which were extensive) were also improper:

> We have condemned Biblical and scriptural references in a prosecutor's closing argument so frequently that it is difficult not to conclude that the remarks in this case were made **either with blatant disregard for our decisions or a level of astonishing ignorance of the state of the law** in this regard.... As we said in Cribbs, "in the face of this clear and longstanding precedent, **the repeated introduction by prosecutors of such references into trials of serious criminal offenses is inexplicable**."

Id. at 559. Although the court found these arguments to be improper, it also determined that these errors were harmless and therefore the court did not reverse the judgment below.

8. The more recent case of Garrett v. State, 2001 Tenn.Crim.App. LEXIS 206 (2001), presents a particularly egregious example of prosecutorial misconduct. The defendant was convicted of first degree murder and sentenced to life. The prosecution's theory at trial was that the defendant locked the victim in the room of a house and then burned the house down, killing the victim. A key factual issue at trial was whether the room where the victim was found had been locked from the outside, which is what the prosecution alleged. Zimmermann had in his files an eleven-page report by an investigator which described a conversation with the Fire Detective who told the author of the report that the door to the room was, in fact, unlocked. Zimmerman never turned his report over to the defense counsel. In the post-conviction hearing, Zimmermann explained that he did not turn over this report to the defense because, essentially, he felt this information was unreliable. The Tennessee Court of Appeals rejected Zimmermann's explanation and found that he committed a Brady violation. Consequently, the court set aside the conviction and granted the defendant a new trial. The Court said:

> We are most troubled with the eleven-page Miller Report, which was not disclosed to the defendant.... The State contends that this report was neither withheld, exculpatory, nor material. We disagree in all respects. The evidence in the post-conviction hearing showed that **the prosecutor led defense counsel to believe** that the State had no information about the locked or unlocked status of the utility room door. However, at trial the State's witnesses testified that the utility room door was locked and the prosecutor submitted to the jury as the theory of the State's case that the defendant locked the victim in the utility room and set the house on fire. Therefore, the State did have, prior to trial, information that the door was locked. In fact, not only did the State have information that the door to the utility room was locked, but they also possessed the eleven-page Miller Report, which indicated otherwise: that Fire Captain Jenkins, who was the firs to enter the utility room and find the victim's body, found the door unlocked.
>
> This eleven-page report was clearly withheld from the defendant. However, the State, in its brief, claims that because Officer Miller informed

> defense counsel that the door was unlocked then this information was not withheld. The State's assertion that the defendant was aware that the State had no information that the door was locked is undermined by the State relying so heavily at trial on testimony that the door was locked. Assistant District Attorney General Zimmerman, when questioned at the post conviction hearing as to why he did not include the eleven-page report in discover, stated, "I felt like Detective Miller's recollection was vague, he could not specifically remember the conversation he had with Captain Jenkins, and all he knew is what he had recorded in his report, which was equivocal, at best, and Jenkins was absolutely clear on it." **This Court is extremely troubled with General Zimmerman's decision** to himself determine the reliability of the evidence and to refuse to turn over evidence he believes is unreliable, especially when the evidence is requested and is exculpatory.
>
> Essentially, the State **intentionally withheld the information by leading the defendant to believe** they had no information about the status of the door and then pursuing the very opposite theory at trial: that the defendant had locked the victim in the utility room and set the house on fire. We agree with the defendant that the information was withheld.

9. State v. Vukelich, 2001 Tenn.Crim.App. LEXIS 734 (Sept. 11, 2001), was a drug trafficking and money laundering case that went to trial two times. In the first trial, Zimmermann asked a witness whether he had smoked marijuana with the defendant on two prior occasions. The trial judge ruled those questions to be irrelevant and inadmissible. In the second trial, despite the trial judge's ruling in the first trial, Zimmermann asked the same witness the very same questions. As described by the appellate court:

> The [trial] court immediately asked for a bench conference and excused the jury. The prosecutor apologized and claimed to have forgotten the trial court's earlier ruling, and **the trial court strongly admonished the prosecutor**.

Later in the opinion, the appellate court said that "the testimony solicited was **patently improper** given the trial court's previous ruling." The appellate court went on to say, however, that this error was harmless because the other evidence of the defendant's guilt was substantial.